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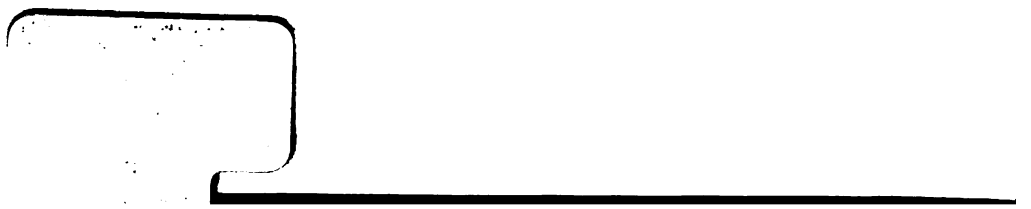

CASES

RELATING TO

RAILWAYS AND CANALS,

ARGUED AND ADJUDGED IN THE

Courts of Law and Equity:

1840 TO 1842.

BY

HENRY ILTID NICHOLL, THOMAS HARE, AND
JOHN MONSON CARROW, ESQRS.

BARRISTERS AT LAW.

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ERRATA.

Page 7, last line but 2 of marginal note, *lege* "were liable."
211, add a reference to *The Midland Counties Railway Co.* v. *Caldecott*, post, p. 394.
297, *n.* (*b*), *insert* "p. 505" after "*Post.*"
368, last line but three of marginal note, after "costs," *insert* "(*b*)."
——for note, *insert* "(*b*) See *Humble* v. *Langston*, post, p. 533."
370, *n.* (*a*), *l.* 1, *read* "important."
380 to 394, in title of Company *dele* "Counties."
488, *n.* (*a*), *l.* 3, after "post," *insert* "p. 522."
530, *n.* (*a*), *l.* 2, after "post," *insert* "pp. 668, 679."
637, *l.* 21, *dele* "not."
647, *l.* 8 from bottom, *insert* comma after "whether."
——————— *dele* comma after "Company."
651, *l.* 11, after "any," *insert* "and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any."
792, *n.* (*c*), for "147," *read* "495."

RAILWAY AND CANAL CASES.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1840.

THE QUEEN

against

THE NORTH MIDLAND RAILWAY COMPANY.

1840.

January 14th.

Under a Railway Act, which gave power to *divert* rivers, water-courses, &c., a Company had raised the level of a brook, into which the sough of a coal mine had been accustomed to empty itself, and thereby caused the water of the brook to flow into the sough, and inundate and stop the coal-works: upon the owner of them applying for a *mandamus* for a jury to *ascertain* and compensate him for the injury done to his works by such diverting of the brook, which was opposed by the Company on the ground, that on the claimant's remonstrance they had restored the brook to its former level, and that no damage had been done by the alteration, such stoppages having been frequently caused by floods before;

Held, that it was a question for a jury to ascertain whether any damage had been done to the claimant, and that his alleging that he was injured by the diverting (i. e. altering the level) of the brook, was sufficient to induce the Court to grant a *mandamus*.

And that if damage be done partly under the powers of a statute and partly not, a *mandamus* and not an action at law is the proper remedy for such lawful acts.

After the sufficiency of a return to a *mandamus* has been decided on concilium, any material fact in it may be traversed.

IN Easter Term, 1839, *Whitehurst* had obtained a rule *nisi* for a *mandamus* to the North Midland Railway Company, to issue their warrant to the sheriff of the county of Derby, to impanel, summon, and return a jury in the manner required by their act, (6 & 7 Will. 4, c. cvii.), for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid by the said Company to John Gratton and Joseph Gratton or either of them, by way of satisfaction, recompense, or compensation, for the damages sustained, or which may be sustained, by them or either of them, by reason of certain works and things done

1840.

REGINA v. THE NORTH MIDLAND RAILWAY CO.

by the said Company, in the execution of the powers of the said act.

The affidavits stated, that John Gratton is and has been for several years the owner of a freehold estate in Stretton, and of all the beds, veins, or delphs of coal situate and lying under a certain other estate adjoining to his said freehold estate, which said other estate is and has been for many years the property of Dorothy Fidler, from whom John Gratton purchased the said coal under her land; but a small portion thereof at the basset or outcrop of the said coal had been wrought and gotten by the said D. Fidler and her family, previously to the said purchase. That John Gratton permitted his son Joseph to work and get the said coal for his own use and benefit, and that in or about the year 1830, Joseph Gratton did make an adit or sough from a stream called Smith's Brook, for the purpose of unwatering and laying dry the coal, and about the end of that year he began to get and sell coal; and that in or about the year 1833, he sank an engine-pit or shaft, of the depth of about sixty-two yards, and put down and erected a steam engine for the purpose of pumping the water from the said coal, to the height of about thirty yards up the said engine-pit or shaft, from which place the water ran off along the said sough or adit from the said engine-pit or shaft into the said stream called Smith's Brook; and he continued to work and get coal from about the year 1830 to October 1838, when he was prevented from working or getting any more coals, in consequence of his said coal works being filled with water.

That the North Midland Railway Company in proceeding to carry the powers of their act into execution, and in pursuance and in execution of the powers and authority by the said act to them given, have altered and diverted the course of the said stream called Smith's Brook into a new course, upon much higher ground and level than the old course, and have thereby caused the water to flow

1840.

REGINA v. THE NORTH MIDLAND RAILWAY CO.

from the said course into or up the said sough or adit, and also to flow into the basset or outcrop of the said coal, and from thence into the said coalworks in such large quantities as completely to inundate the said coal and render it impossible to work and get the same. Messrs. Gratton accordingly gave notice to the Company of this injury, and demanded compensation, requesting that the matter in dispute might be submitted to the determination of a jury or to arbitration; they also entered into the bond required by the 38th section of the act.

The affidavits in answer stated, that the colliery has for several years been liable to occasional stoppages from water flowing into the works; and even after the erecting of the steam-engine, the water still occasionally flowed into the works in times of flood, and during continued wet weather, through the basset or outcrop of the coal, so as to stop the works for a time; and that when the new course of the brook was first set out at a higher level than the ancient course, and whilst the works thereof were in progress, upon the suggestion of the said Joseph Gratton, instructions were given to the contractor to make the bottom of the new course, and the same was accordingly made, of the same depth as the adit or sough of the colliery, so as to permit the same to drain freely and uninterruptedly into the brook, as it had theretofore done, the level of the new course at the place in question being, in point of fact, the same as that of the old brook-course; and that after the new course was completed, the water from the colliery while in work, has been constantly seen draining into it through the adit or sough; and that on the 19th of January, 1839, and two following days, there was a very heavy flood, which washed a quantity of earth or soil down the new course, and partially obstructed the mouth of the sough or adit; and that such soil still remains, it not being considered necessary to clear the same away, as the colliery had ceased to be worked for a period

1840.

REGINA v. THE NORTH MIDLAND RAILWAY CO.

of about three months before that time; and that the new channel or course is made on the natural surface of the ground by means of an embankment on each side, where the same passes over the basset or outcrop of the seam of coal which is worked by the colliery, and consequently that such basset or outcrop is not intersected or in any respect interfered with by it, whereas the same was directly intersected by the old brook-course. It was positively denied that the Company have by the diversion of the stream, or by any other work done by them, caused the water to flow from such stream into and up the sough or adit, or that they have caused the water to flow into the basset or outcrop of such coal, and from thence into the coalworks, in larger quantities than it has always done, or to render it impossible to work or get the same, and that there is no doubt from the result of levels which have been taken, that the level of the adit or sough is several feet lower at the brook than at the colliery (*a*).

(*a*) By the stat. 6 & 7 Will. 4, c. cvii. s. 12, it is enacted, that, for the purposes, and subject to the provisions and restrictions, of this act, the said Company are hereby empowered (amongst other things) to alter the course of any rivers, canals, brooks, streams, or watercourses, as may be necessary, for constructing and maintaining tunnels, bridges, whether temporary or permanent, or passages over or under the same, and to divert or alter the course of any rivers or streams of water, roads or ways, or to raise or sink any such rivers or streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the said railway, and to make drains or conduits into, through, or under any lands adjoining the said railway, for the purpose of conveying water from or to the said railway, and from time to time to alter, repair, or discontinue the beforementioned works or any of them, and to substitute others in their stead, and to do and execute all other matters and things necessary or convenient for making, maintaining, altering, or repairing and using the said railway, and all other works by this act authorized; they, the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said Company making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all da-

1840.

REGINA v. THE NORTH MIDLAND RAILWAY CO.

M. D. *Hill* and *Cresswell* now shewed cause (*a*).—The claimants have not taken the right course, they ought to have brought an action; for it is not shewn by the affidavits, that the Company were entitled by their act to change the level of the brook; and this Court, before interfering, must be satisfied that there is something which the statute requires to be done. Here the Company have diverted a water-course, but not the property of the claimants; if thereby injury has been done to the coal-owners, no doubt they are entitled some way or other to compensation, which (by section 32), is to be ascertained by a jury: but that assumes there has been damage done, as, if the Company have taken the claimants' land or injured their property, there is some damage contemplated by law, and there must be some recompense; but, unless they shew that in their affidavits, why should a *mandamus* issue to find, first, whether any damage has been done, and if so, to what amount? But there is also a satisfactory answer given by the Company, that although they once raised the level of the brook; yet, when it was pointed out to them that they were doing mischief, they lowered it again. At all events, the claimants have their common law right and may sue; they cannot have a *mandamus* to inquire whether they have been injured or not.

Jervis and *Whitehurst*, contrà.—It is only necessary to shew that the course was diverted, and in a state of diversion, when the claimants applied. [Lord *Denman*, C. J.—Did they give you notice that, whatever damage was done,

mages to be by them sustained in or by reason of the execution of all or any of the powers hereby granted; and this act shall be sufficient to indemnify the said Company, and all other persons, for what they or any of them shall do by virtue of the powers hereby granted, subject nevertheless to such provisions and restrictions as are hereinafter mentioned and contained.

(*a*) Before Lord *Denman*, C. J., *Littledale*, and *Coleridge*, Js.

1840.

REGINA v. THE NORTH MIDLAND RAILWAY CO.

had been cured? if so, you would have been bound to meet it in your affidavits.] No: and the claimants state positively, that, in October, 1838, they were prevented working the mine. (Here they were stopped by the Court.)

Lord DENMAN, C. J.—We do not adjudge that there is damage done; that is a question for the jury: it is enough to induce us to issue a *mandamus* that the claimants say, by the raising of the level of the brook, that being part of the word "diverting," they have suffered.

LITTLEDALE, J.—They cannot recover by action for the lawful acts, they must have a *mandamus* for that If part of the injury has been done under the powers of a statute, they cannot have their remedy for it by action at law.

COLERIDGE, J., concurred.

Rule absolute.

A *mandamus* was issued accordingly, to which a return was made; and *Whitehurst* in the following term moved for a rule to shew cause why it should not be quashed, *as to part*, relying upon the authority of *Rex* v. *The Mayor and Aldermen of London* (*a*), where Lord *Tenterden*, C J., says, "On the true construction of this statute (9 Anne, c. 20, s. 2), the party if he intend to traverse any fact, must do so before he sets the return down for argument, and takes the opinion of the Court as to its sufficiency."

Lord DENMAN, C. J.—There is no difficulty in your being allowed to traverse such facts as may be material, after the sufficiency of the return has been decided on concilium: you may set it down for argument, and traverse afterwards.

(*a*) 3 B. & Ad. 279.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1840.

THE BATH RIVER NAVIGATION COMPANY
against
WILLIS and Others.

1840.
January 21st.

By an act of Parliament certain persons were authorized to make the river *Avon* navigable from B. to H., and to maintain such navigation; and for those purposes (amongst other things) to make new cuts through lands adjoining, and to build bridges and water-locks, and to set out and appoint towing-paths for men, first giving satisfaction to the owners of lands; and commissioners were appointed to settle by inquisition what satisfaction every person should have for such proportion of his lands as should be made use of for such purposes, and what share of such satisfaction every person having a particular estate or interest therein, should receive for his respective interest. The undertakers, in consideration of the expenses, were authorized to take for their own use certain tolls. By a subsequent act, which recited that they had proceeded to *purchase* certain lands under the former act, they were empowered to make a horse towing-path, with similar provisions as to the purchase of lands. They made the river navigable, and made a certain cut lock and horse towing-path, for the purpose of the navigation, in and upon lands taken by virtue of inquisitions under both acts, which assessed as damages thirty years' purchase to some, and an annual payment to others. No actual conveyances were ever made.

Held, that the Company were liable to be rated to the poor for such cut lock and towing-path, and that no conveyance was necessary for lands taken under such powers.

REPLEVIN.—The declaration stated that the defendants on the 25th of June, 1836, in the parish of Bitton, in the county of Gloucester, in a certain part of a river called the river Avon, near to and adjoining Sydenham Mead, in the said county, took a certain barge of the plaintiffs, of the value of £100, and unjustly detained the same &c. Avowry by defendants, that the seizing, taking, and detaining the said barge were done by the defendants, by authority of an act of Parliament (43 Eliz. c. 2), for the relief of the poor, and according to the purport, tenor, and effect of the said act. Plea, *de injuriâ;* whereupon issue was joined. At the trial before *Parke*, B., at the Gloucestershire Spring Assizes, 1837, a verdict was taken by consent for the defendants, subject to the opinion of this Court, on the following case:—

At the time of the making of the rate and levying the distress hereinafter mentioned, the defendants were the

1840.

THE BATH RIVER NAVIGATION CO. v. WILLIS & Others.

chapel-wardens and overseers of the poor of the hamlet of Hanham, in the parish of Bitton, which hamlet maintains its own poor. The plaintiffs are the proprietors of the navigation of the river Avon, from the city of Bath to or near Hanham Mills, under the provisions of the statutes 10th Anne, c. viii, and 47th Geo. 3, c. cxxix, (local and personal), both which said acts are to be taken as part of this case. By the 1st section of the 10 Anne, c. viii, the mayor, aldermen, and common council of the city of Bath, their successors and assigns, or such persons as they should nominate, as therein directed, were empowered to make the said river navigable from the said city to or near Hanham Mills; and also to make any new cuts through the lands adjoining or near to the said river, and to make bridges and water-locks; and also to set out and appoint towing-paths and ways for men for hauling or drawing boats and other vessels passing along the said river and cuts, first giving satisfaction to the owners of such lands as should be dug or otherwise made use of for pathways or carrying on the said navigation. By section 2, certain persons therein named were appointed commissioners for settling all differences between the undertakers and the proprietors of the said lands, and were also empowered to settle what satisfaction every owner and occupier of such lands adjoining or near the said river, as should be intended to be made use of for effecting the said undertaking, should have for such proportion of his lands as should be made use of as aforesaid; and what share of such purchase-money or satisfaction every tenant or other person should receive: and in certain cases they were authorized to summon a jury, to assess such damages and recompense to the said owners and occupiers for their respective estates and interests therein, by reason of the cutting, digging, removing, or using any land for the purposes aforesaid, or for the loss or damage they should or might sustain thereby. And upon payment of

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the sums, assessed or agreed upon, the said undertakers were authorized to *have, use, and enjoy* the said lands to and for their own proper use and benefit. By section 4, they were authorized to take certain tolls therein particularly specified. And by section 8, the said river Avon was made an open, common, navigable river, and all persons were permitted to navigate the same, without any obstruction whatsoever, on the payment of the rates and dues limited by the said act. By the said act of the 47th Geo. 3, it is recited, that the mayor, aldermen, and common council of the said city had nominated the Duke of Beaufort and others therein mentioned to make the said river navigable as aforesaid, and to have all the powers and authorities for the doing thereof, in the said first act mentioned. And that the said nominees had proceeded to purchase lands and hereditaments, and to make the said navigation and works; but the said act (10 Anne), not containing any powers to make a horse towing-path, which had occasioned great expense and delay, the said act of 47 Geo. 3, empowered them to set out and make from time to time, and to repair and keep in repair along the banks of the said navigation, a convenient towing-path, for drawing with horses or other beasts any boats or other vessels using the said navigation; and to erect any bridge or culvert across any river, brook, ditch, or other place, for the better setting and making of the said towing-path; and provided that the lands taken for such towing-path should not exceed certain dimensions; and that maps or plans, describing the line of the said towing-path and the lands through which the same was to be carried, were deposited with the clerks of the peace of the said counties, to remain in their custody, to the end that all persons might have liberty to inspect and make copies of the same, upon the terms therein mentioned. And the proprietors and their successors were enabled to purchase to them and their successors, for the purposes of the same act, any nds necessary for the same, and contained in the said

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maps and plans, or to treat with the owners and proprietors of the said lands for the damage to be done thereto, respectively, in the execution of the purposes of the act, and to appropriate the same for the purposes aforesaid.

By virtue of the said act of 10 Anne, the predecessors of the plaintiffs made the said river navigable, and the plaintiffs have so continued the same up to the present time, and have made divers new cuts where necessary, in and through the lands adjoining or near to the said river, for the better and more convenient navigation thereof, the length of such several new cuts together amounting to about seven furlongs, that of the whole navigation being twelve miles; and also have set out and appointed towing paths for men for hauling boats and other vessels passing in, through, and upon the said river and new cuts; and have also made a new cut, parcel of the aforesaid new cuts, and a lock, and set out a like towing-path for men by the side of the said new cut and locks in certain lands at Hanham; and have from the time of the making thereof continually hitherto maintained, and still do maintain the same, being the cut or canal and the locks described in the rate hereinafter mentioned.

After the passing of 47 Geo. 3, the said plaintiffs did, by virtue of the same act, set out, and make, and complete on the side of the said river and cuts, and have continually hitherto repaired and maintained through the lands upon the sides of the said river and cuts, a convenient towing-path, for drawing with horses or other beasts any boats or other vessels passing along the said river or cuts; and built, put up, and made, for the convenience of the landowners adjoining to the said river, and also for the common convenience of the persons using the river with their boats and barges, divers gates and wickets, and divers bridges and culverts over the rivers, brooks, and ditches, in and upon the same lands; a part of the said towing-path running partly by the said river, and partly by the side of the said cut and locks, containing about two miles in length, is situate in

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the said hamlet of Hanham. A public footway runs for about 1220 yards along the same line as the said towing-path in the hamlet of Hanham, and was used as such before the passing of the 47 Geo. 3; and of the quantity permitted to be taken for a towing-path by that statute, about six feet in breadth is made use of for that purpose, the remainder is depastured or otherwise occupied by the landowners and occupiers adjoining the said pathway, who have free liberty under the act aforesaid to use the towing-path, so far as the same shall adjoin to their respective lands, as a footway, bridleway, and driftway for their cattle, to and from their watering-places and landing-places at the said river. There are several gates, rails, and wickets across the said part of the said towing-path in the said hamlet, which are the property of, and are kept up and repaired by the said plaintiffs, according to the said act, for the benefit of the occupiers and owners of the land through which the horse towing-path is made; the said towing-path has always been repaired by the plaintiffs and their predecessors, as occasion required. There are also in the said hamlet several bridges and culverts over streams of water, over which the towing-path passes, which bridges and culverts were built and are repaired by the plaintiffs. That part of the towing-path situate in the said hamlet, is, for the greater portion thereof, not divided by any fence, ditch, or other boundary from the fields by the sides of which it passes, but lies open to the same; so that the cattle which are put into the said fields may stray upon and across the said towing-path: but one part of the said towing-path in the said hamlet, containing about 286 yards in length, is fenced off, on the opposite side from the said river, from an orchard, in the occupation of Samuel Nurse, which fence is made by the owner and occupier of the land adjoining the said towing-path, and not by the said Company; and there is a gate put up and maintained by the said plaintiffs across each end of the part so fenced off as aforesaid.

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The occupiers of the fields by the sides of which the said towing-path passes, are not, and never have been, since the making of the said towing-path, rated to the relief of the poor of the said hamlet, for or in respect of the land used for the said towing-path; but are rated only for the quantity of land which each field contains over and above the land so used for the said towing-path as aforesaid; the said towing-path is used by the said plaintiffs, and by such persons as are authorized to use the same by the said acts, and by no other persons whatsoever. The plaintiffs are in such possession of the said cut locks and towing-paths in the said hamlet of Hanham as the said acts of Parliament give them under the facts herein stated. The plaintiffs have paid to the owners of the said lands annual sums for the same, taking receipts in the following form:—"25th March, 1837. Received of the Kennet and Avon and Bath River Navigation Company, 2*l.* 6*s.* 3*d.* for one year's rent of land used for towing-path, due this day."

The act 47 Geo. 3 gives the power to the said proprietors of the navigation to purchase land for the towing-path, but no conveyance was ever made to the said Company for that purpose, of any lands in the said hamlet of Hanham; but two inquisitions were taken of lands in Hanham under the aforesaid acts.

The Company, previously to the making of the said towing-paths, bridges, culverts, and other works, gave a satisfaction and remuneration to the respective owners and proprietors of such lands, tenements, and hereditaments respectively, as were required for the purposes of the said Company, in the making and constructing of the said towing-path and other works, for the damage done to them, by payment to some of them respectively of a general sum or annual payment in respect thereof; and to others of the said owners and proprietors such a sum in gross, by way of damages, as was a full recompense for the same.

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The plaintiffs and their predecessors have, ever since the making of the said navigation, received for their own use the tolls granted by the said acts respectively. The boundary of the said hamlet of Hanham is the middle or dividing line of the said river Avon; and consequently one half of the said river, (which half is next to the said towing-path), is situate within the said hamlet. The plaintiffs are not, and never have been, rated to the said hamlet in respect of that part.

Ever since the completion of the said towing-path for horses, the plaintiffs have been rated to the relief of the poor of the said hamlet for the said cut locks and towing-paths, situate in the said hamlet, and have paid the said rates.

A rate for the relief of the poor of the said hamlet was duly made, allowed, and published, on or about the 17th of March, 1836, whereby the plaintiffs were rated as follows:—

"Robert Bruce, Esq., and Bath River Navigation Company, in respect of their towing-path, and also the cut or canal, and the locks thereunto appertaining—£13."

The plaintiffs having refused to pay the said rate, were duly summoned to appear before two justices of the peace, who, on no sufficient cause being shewn for such refusal, duly issued a warrant of distress, by virtue whereof the barge, in the declaration mentioned, being the property of the plaintiffs, was seized as a distress for the sum of £13, so assessed upon the plaintiffs, as aforesaid.

The principal points in the two inquisitions referred to in the argument were as follows:—By the first, taken August 25th, 1720, the jurors found that a water-cut and lock were needful, and assessed the damages as a full recompense for the ground to be taken, at thirty years' purchase, at the rate of 40*s*. per acre. They also found, that a towing-path, a quarter of a perch in breadth, was necessary in the parish of Bitton, extending through the lands of the persons therein mentioned; and they assessed the same damages (thirty years' purchase) to the owners of the

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fee. The interest of the termors was also determined, and satisfaction given to the tithe-proprietors; and also to the overseers of the poor, in respect of the loss of rights of common. By the second inquisition, taken in 1813, the commissioners, without the intervention of a jury, having heard evidence as to the value of certain freehold land belonging to a Mr. Creswick, required for the horse-towing path, and the damage that would be done thereto, did adjudge, settle, and determine, that the proprietors should pay to him, his heirs and assigns, thirty years' purchase, for land discharged of commonable rights, and five guineas per annum per acre for other land taken and used for the purpose aforesaid, which annual payment was to be considered as a satisfaction and remuneration to all persons having any interest in, or claim whatever to such last-mentioned land.

The question for the opinion of this Court is, whether this action will lie. If it will, then a verdict is to be entered for the plaintiffs for the sum of four guineas; if not, the present verdict is to stand.

Sir *J. Campbell*, Att.-Gen., for the plaintiffs (*a*).—The right of the Company to this navigation depends entirely upon the two statutes, 10 Anne, c. 8, which gives them a power to make such navigation, and to take tolls; and the 47 Geo. 3, which enabled them to take land for horse towing-paths, &c. The question of rateability is not provided for in these acts, and therefore depends entirely on the construction of the 43 Elizabeth. The plaintiffs contend that they are not rateable at all; for they are not the occupiers of the land covered with water used for the cut, nor for the lock and towing-path. *Rex* v. *Thomas* (*b*) was decided expressly on the ground, that the Company had purchased the lands; but the facts stated shew that is not the case here. No conveyances have ever been made to

(*a*) Before Lord *Denman*, C. J. *Littledale*, *Williams*, and *Coleridge*, Js.
(*b*) 9 B. & C. 114.

the plaintiffs, and they have merely an easement. That case, too, decided that they are not the occupiers of the river; and the new cut and lock are now part of the river, and the right of the plaintiffs only the same in them as in the river. They could not maintain trespass, for the soil is not in them, and all the Queen's subjects have a right to pass along the bed of the river, it being a public highway; and so they have along the cut. *Rex* v. *The Mersey and Irwell Navigation Company* (*a*), and *Rex* v. *The Ayre and Calder Canal Company* (*b*), were decided on the same ground as *Rex* v. *Thomas*. In the first of these cases, *Parke*, J., says: "No person can be an occupier, unless he has the exclusive right to enjoy some portion of the soil." And see *Rex* v. *Jolliffe* (*c*). Then, as to the towing-path, they have no exclusive occupation; the soil remains in the owners of the land, and they pay the sums mentioned in the case for the liberty of passing over it. The case of *Rex* v. *Bell* (*d*) is no authority to the contrary; for there by inclosing, and so excluding all other persons, the defendants had converted a lease for years of way-leave into an actual exclusive occupation, and were held properly rated as occupiers. The towing-path is a highway, as in *Rex* v. *The Severn and Wye Railway Company* (*e*), where a *mandamus* issued to them to put the railway in repair, because it was a highway, the general principle of which case has never been doubted by this Court. At all events, therefore, the Company is not rateable for the towing-path, and if so, the verdict must be entered for the plaintiffs; for if the rate is bad in part, it is bad altogether. *Rex* v. *Wellbank* (*g*).

Greaves, contrà.—It must be admitted, that, if a joint rate be made upon two subject-matters, one of which is

(*a*) 9 B. & C. 95.
(*b*) Id. 820.
(*c*) 2 T. R. 90.
(*d*) 2 T. R. 598.
(*e*) 2 B. & Ald. 646.
(*g*) 4 M. & S. 222.

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not liable to be rated at all, and a warrant issue for both, such warrant is bad (*a*). The case of *Rex* v. *The Mersey and Irwell Navigation Company* (*b*) is the nearest to the present, and the act on which it was decided and the statute of Anne in this case are very nearly identical. The first clause of the statute of Anne recites, that the river Avon was theretofore navigable at spring tides *only*, which proves it was not a public river. The second section appoints commissioners for settling differences with the owners of lands; and in case the parties refuse or are incapable to treat, a jury is to be summoned to assess the damages and recompense to the owners for their respective estates; and upon payment of the sums assessed, the Company may enter and "have, use, and enjoy the lands to and for their own proper use and benefit." Now, the first inquisition expressly complies with all the requisites of this section, and states, that the jury found that certain particular lands were necessary for a cut lock and towing-path, and they also assessed certain sums as damages, for which the commissioners pronounced judgment. Hence it is clear, that under this statute the Company did take the lands by purchase; for, after the payment of the sums assessed, the lands would vest in the Company *for their own use and benefit*. Conveyances would only exist where there was a voluntary sale. The proceeding by inquisition was provided for cases where there was a refusal or incapacity to sell. *Rex* v. *The Mersey and Irwell Navigation Company* (*b*) is under the 7 Geo. 1, c. 15, and is expressly in point. The act is similar, and the vesting words and the facts found in both cases are the same, and it is clear there, from the judgments of Lord *Tenterden*, C. J., and *Littledale*, J., that they considered the towing-paths rateable. It is said *Rex* v. *Thomas* (*c*) was decided on the ground, that the Company were the purchasers of the lands, but that is not

(*a*) See cases in the note at the end of this argument.

(*b*) 9 B. & C. 95.

(*c*) Id. 114.

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found in the case. It is also said that this is an easement; but an easement is some right or privilege to be exercised over the land of another; and if a privilege be such as to confer an exclusive occupation it is not an easement; *Rex* v. *The Chelsea Water Works Company* (*a*) clearly shews that the locks and cuts are rateable. It is also said, that this property is not so, because on paying tolls the public have a right to use it, as in the case of a turnpike-road; but in every turnpike act there is a clause exempting the commissioners from rates, otherwise if they received benefit they would be rateable. So in the case of a market, although all persons may resort to the market, yet the owner of the tolls is rateable if he be the owner of the soil also: *Rex* v. *Bell* (*b*). But they have here an *exclusive* possession, by having a right to exclude all but certain individuals. With respect to the towing-path, the terms of occupation are not material; it is of no consequence *quo nomine* a party occupies: then the 47 Geo. 3, which applies to the towing-path only, recites that they proceeded to purchase; and if this were a mere way-leave, it is strange that the act should require maps and plans. It gives power to set out, make, and repair a towing-path, and provides that the land taken for that purpose shall not exceed a certain width; therefore, something is intended which is to be specified by metes and bounds—not an easement. They have also powers to purchase lands, and a provision (on which the second inquisition turns) that, in case of refusal or incapacity to treat, the damages shall be assessed by a jury summoned by the commissioners. Section 19 gives them power to enter lands upon payment of the sums so assessed, and thereupon vests all the estate in them. The argument raised at the sessions was, that this act made a distinction between money paid for the purchase and money paid as a compensation for damages;

(*a*) 5 B. & Ad. 157. (*b*) 5 M. & S. 221.

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that in the latter case they had only an easement; but the latter words clearly apply to damage done where the lands are not required by the Company; as, for instance, the cutting of trees and removal of fences, payment for which must be made, and yet the soil will not vest in the Company. The second inquisition awards the payment of an annual sum per acre for these lands; therefore, at all events they took them as tenants from year to year; and if tenants so as to be enabled to support an action of trespass, it is enough for this case. There are several provisions in the act of 47 Geo. 3, inconsistent with this being an easement. By section 28, the owners of the land are allowed to use the towing-path as a way. If the right of soil remained in the owners, there would be no necessity for such a provision. The judgment of *Tindal*, C. J., in *Alexander* v. *Bonnin* (*a*) furnishes an unanswerable argument that these rights were reserved for the purpose of giving them what they were not otherwise entitled to. Then the provisions as to the sub-soil, that the proprietors of lands may make culverts, drains, &c., are strong indications of a sale. By sects. 36 and 38, the owners are allowed to make sewers or wharfs, which is inconsistent with the idea that the right to the soil remained in them. As to the cattle straying over the towing-path, every one is bound at common law to fence his land so as to prevent his cattle trespassing on his neighbour's land, unless the burthen of maintaining fences can be thrown upon others; *Doyle* v. *Drake* (*b*), *Boyle* v. *Tamlyn* (*c*); but still in law the land of each individual is distinct, although there be no division between it and another person's land. In Rolle's Abridgment (*d*) it is said, "If my land be open to the highway, and the beasts of a stranger enter on the land, this is not justifiable." So, in *Welden* v. *Bridgewater* (*e*),

(*a*) 4 B. N. C. 798.
(*b*) Moore, 775.
(*c*) 6 B. & C. 329.
(*d*) 2 Trespass (I), pl. 7.
(*e*) Cro. Eliz. 421. See Dyer, 372 b.; *Whiteman* v. *King*, 2 H. Bl. 4.

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"If a meadow be divided annually among certain persons by lot, after the several portion of each is allotted, each is capable of maintaining an action of trespass quare clausum fregit, for each has an exclusive interest for the time," and it is not necessary there should be an actual separation by fences (*a*). The case finds as to the towing-path, that they took only six feet in breadth out of the twenty allowed them, and that the remainder was depastured or otherwise occupied by the landowners: that, coupled with the finding, that it is used by the plaintiff and others authorized by the act and *no one else*, conclusively shews that the Company are the occupiers. The owner of a towing-path is rateable for it, though others may have easements upon it. In *Rex* v. *The Mayor, &c., of London* (*b*), the appellants had leased the herbage and pasturage of the towing-path, and it was expressly found that their lessee was in possession of the herbage and pasturage, and rated for the same, and Lord *Kenyon*, C. J., said, "he had no doubt they were occupiers, for the case expressly states, that the lessee's interest is confined to the herbage and pasturage; and therefore if any injury were done to the soil, the appellants might maintain trespass for it." That case is stronger than the present, because there there was an express letting of the *prima vestura*; here there is merely the fact of the cattle straying over the path through want of fence. Suppose, in the case of *Rex* v. *The Chelsea Water Works Company* (*c*), instead of the pipes or mains being under ground, they had run just on the surface, but still so as to be part of the soil; they would have been rateable. So if an open stone channel, or even a pavement were made across a field, the owner of the channel or pavement would be rateable, upon the principle of the cases as to pipes and mains; because the stones and channel would exclude the occupiers of the land, and the owner could

(*a*) 3 Bl. Com. 209. (*b*) 4 T. R. 21.
(*c*) 5 B. & Ad. 157.

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maintain trespass for any injury done to them, as they could in this case for any damage done to the stones of a bridge, or to the materials of which the towing-path is formed. As to the case of *Rex* v. *Bell* (*a*), that was decided simply on the ground, that, by the fences &c. there was an exclusive occupation. In *Rex* v. *Jolliffe* (*b*) the marginal note goes further than the case warrants; the party there rated was only tenant in common with another, and both of them used the way; and *Ashurst*, J., says (*c*), "It cannot be said on this state of this case, that the defendant was an *occupier* of anything, for all that he has is a concurrent right of making use of the way-leave." But under these acts the Company can prevent any persons, except those exercising the powers of the acts, from using the towing-path. *Rex* v. *The Birmingham Canal Company* (*d*), *Rex* v. *The Oxford Canal Company* (*e*), *Rex* v. *Mitton* (*f*), *Rex* v. *The Oxford Canal Company* (*g*), *Rex* v. *St. Mary, Leicester* (*h*), *Rex* v. *The Regent's Canal Company* (*i*), *Rex* v. *Kingswinford* (*k*), *Rex* v. *The Trustees of the Duke of Bridgewater* (*l*), *Rex* v. *Chaplin* (*m*), *Rex* v. *Chelmer and Blackwater Navigation* (*n*), *Rex* v. *Woking* (*o*), and *Rex* v. *Palmer* (*p*), are all decisions as to towing-paths; in which last case alone the towing-path was separated from the adjoining lands by a ditch; and it is remarkable that, except in *Rex* v. *The Mersey and Irwell Navigation Company* (*q*), this should be the first time of that point being raised. Therefore it is submitted, that, under both these acts and the facts found by the inquisitions, the parties have a rateable interest in this property, and stand in the same situ-

(*a*) 7 T. R. 598.
(*b*) 2 T. R. 90.
(*c*) P. 94.
(*d*) 2 B. & A. 570.
(*e*) 4 B. & C. 74.
(*f*) 9 B. & C. 810.
(*g*) 10 B. & C. 163.
(*h*) 6 M. & S. 400.
(*i*) 6 B. & C. 720.
(*k*) 7 B. & C. 236.
(*l*) 9 B. & C. 68.
(*m*) 1 B. & Ad. 926.
(*n*) 2 B. & Ad. 14.
(*o*) 4 Ad. & E. 40.
(*p*) 1 B. & C. 546.
(*q*) 9 B. & C. 90.

ation as if the fee had been conveyed by lease and release, or any other common conveyance.

As to the cases cited on the other side, *Rex* v. *The Severn and Wye Railway Company* (*a*) has no bearing on this question. That was a *mandamus* to perform a public duty, and there was no question as to occupation. The two cases cited in *Rex* v. *Thomas* (*b*) are distinguishable from this. *Hollis* v. *Goldfinch* (*c*) was decided on the ground of misdirection, and long before *Rex* v. *Thomas* (*b*), and is therefore no authority against it. *Buckeridge* v. *Ingram* (*d*) was on the same act of Anne as this case, and is very inaccurately reported. The judgment varies from the facts stated; the question was, whether the shares of the Company were subject to dower as being a real tenement. The judgment, if applied to the stream of the river, is perfectly consistent with *Rex* v. *Thomas* (*e*); and as parties are dowable in lands or tenements, it was wholly unnecessary to decide whether the lands vested or not; the comparison to the right of piscary mentioned there (*g*), shews that the judgment had reference to the river, and not to the cuts or locks. Lastly, the rate here is general on the towing-path; there is no specification of bounds or limits, and the finding clearly shews an exclusive occupation of the part of the towing-path next to Nurse's Orchard. In all the cases, from *Milward* v. *Caffin* (*h*) down to the present time, where the warrant of distress has been held bad, the parties were not in the occupation of some one subject matter specified in the rate. Here there is an occupation of every subject matter named in the rate, and therefore the distress was good.

(*a*) 2 B. & A. 646.
(*b*) 9 B. & C. 114.
(*c*) 1 B & C. 205.
(*d*) 2 Ves. jun. 652.
(*e*) 9 B. & C. 114.
(*g*) 2 Ves. jun. 664.
(*h*) 2 W. Black. 1330; *Hurrell* v. *Wink*, 8 Taunt. 369; 2 B. M. 417, S. C.; *Weaver* v. *Price*, 3 B. & Ad. 409; *Marshall* v. *Pitman*, 9 Bing. 595; *Governors of Bristol Poor* v. *Wait*, 1 A. & E. 264.

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Sir *J. Campbell*, Att.-Gen., in reply.—The Company never acquired the property of the soil; they made no purchases, nor did any conveyance pass; *Rex* v. *The Mersey and Irwell Navigation Company* (*a*). The case of *Rex* v. *Thomas* (*b*) proceeded on the ground, that the soil belonged to the parties. Lord *Tenterden*, C. J., says in that case (*c*), "We agree with the quarter sessions in deciding, that the cut or navigable canal, which was actually made by this company *upon land purchased* by them, and the lock which is erected *on such land*, are, according to all the authorities, fit subjects to be rated for the poor." [*Littledale*, J.—There is a rent of five guineas to be paid to the owner, his heirs and assigns.] That is an annual compensation, but no purchase of the soil. By the act, the Company are required to do as little damage as may be: that supposes the land to be still in the owner. In the case of *Rex* v. *The Chelsea Water Works Company* (*d*) there was exclusive occupation. As to the towing-path the inquisition is the same as the one taken under the 10 Anne—the herbage was consumed, in that and other respects any injury was to be estimated by the jury; but the soil was not taken from the original owners and vested in the proprietors. In *Alexander* v. *Bonnin* (*e*) no doubt there was a right of soil; there, the place in dispute was conveyed, and the only question was how much passed by the deed. In the case of *Rex* v. *The Mayor &c. of London* (*g*) the mayor and corporation, instead of an easement, had the soil in them; they purchased from Sir W. Dolben, had the fee-simple conveyed to them, and let out the herbage in right of being the owners of the soil. As to the criterion of trespass, could the Company maintain an action against a stranger for trespassing on the towing-

(*a*) 9 B. & C. 95.
(*b*) Id. 114.
(*c*) P. 129.
(*d*) 5 B. & A. 157.
(*e*) 4 B. N. C. 799.
(*g*) 4 T. R. 21.

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path? They have not the occupation of it, for the fee-simple was never conveyed. No great reliance is to be placed on *Buckeridge* v. *Ingram* (*a*); but the case of *Hollis* v. *Goldfinch* (*b*) is very material, for there it was held to be only an easement, and that trespass was not maintainable. In *Rex* v. *Jolliffe* (*c*) there were two way-leaves, and the defendant was held not rateable for either, as having no exclusive occupation. The cases where towing-paths have been held to be rateable, are no authority as to the right of soil. In this case there is only an easement, and there is no distinction between the cuts and locks and the ancient bed of the river. This case comes within *Rex* v. *Jolliffe* (*c*), not within *Rex* v. *The Mersey and Irwell Navigation Company* (*d*), and not being rateable for part, they are not for the whole.

Lord DENMAN, C. J.—This case has been argued with a great profusion of learning: but many of the facts need not be taken into consideration; such as, that there are no conveyances, and that the Company have always before been rated. The question is upon the effect of the acts of Parliament, whether the Company are such occupiers of *all* these premises as to make them liable to be rated. I must own I entertain no doubt on the subject; I think they are clearly occupiers, and liable to be rated. Suppose a person were to enter on the land of another, and the jury in an action against him, gave, by way of damages, the value of the land; if the trespasser continued in occupation, there would be no conveyance to him, and no title; but when the parish came to rate, he must be assessed; it is quite clear he is the occupier, and so rateable: but that is a much weaker case than this. Under the statute of Anne, this is the usual mode of enabling owners to sell, and the

(*a*) 2 Ves. jun. 652.
(*b*) 1 B. & C. 205.
(*c*) 2 T. R. 90.
(*d*) 9 B. & C. 95.

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jury are to assess damages and recompense. Here is an inquisition by which it clearly appears that the jury give thirty years' purchase, and after that the Company take the land entirely and to their own use, the lord of the fee being entitled to compensation afterwards. They are the exclusive occupiers of the cuts and locks, and the managers and occupiers of land covered with water. As to the towing-path, I do not see, that allowing strangers to cross it divests the exclusive occupation; if so, few landowners in the country could be said to be exclusive occupiers.

LITTLEDALE, J.—I think the Company are liable to the rate for the cuts and towing-path; for the cuts under the statute of Anne, which gave them the power to purchase, not indeed expressly, but the statute speaks of purchase-money, and says, "They are to have and enjoy the land to and for their own use and benefit," implying not merely an easement. Then, it is said there were no conveyances. That may be true, but there has been a sitting of commissioners, and a jury have assessed a sum with the approbation of the proprietors, as a full recompense and remuneration for the same: thirty years' purchase to some, and different degrees of value, according to different persons, and a further compensation for the towing-path. I must observe, that the statute of Anne not only directs money to be paid for recompense, but also for damage. That I take to be damage done to the land of persons who retain it in their own possession, as if two parts of a field were separated, and either part thereby prejudiced. Where there is a distinct assessment of damages for the particular injury to be done, there is a distinct compensation; as for the tithe of hay and corn. As to the 47 Geo. 3, which recites the great difficulties which had arisen from the want of horse towing-paths, the beginning of that recital is a recognition of purchases, and there is a distinct power to purchase given in a more full manner than under the

statute of Anne; that shews they had a power to sell, notwithstanding the lands were held in mortmain, therefore the purchases were meant to be to the extent of the interest in the soil, and the act describes the form of conveyance. It is contended, that, because no conveyance was executed, no land passed; but it seems to me that a conveyance was not necessary. It is only necessary in contracts between party and party; when a jury has recorded its verdict, that is the title by which they hold the land, and a conveyance would be perfectly useless. Then we must see what has been done by the inquisition under the 43 Geo. 3; persons came and gave evidence of value, one man was an owner and occupier; they pay him, his heirs and assigns, five guineas yearly for ever, that is a rent in fee. It has been observed on this, that it does not speak distinctly of paying rent in so many words; but I think a purchase would include a gross sum or an annual rent. When it comes to speak of compensation, it uses the word *rent*. There is a power given to make purchases, and it seems they have done so under both statutes, which being recorded by the jury, gives a good title. It is not necessary to inquire whether they have the legal estate: supposing there were a defect in the conveyance, they would stand in the situation of persons let into possession without a conveyance. If they were in possession, that property is as much the subject of rate as any other.

WILLIAMS, J.—I am entirely of the same opinion. The conclusion in each case depends on the particular facts attending it, and it by no means follows that, because towing-paths have been held in other cases to be rateable, that they are so in this. I own I have never entertained any doubt as to cuts and locks being rateable; they are the same in species as ordinary canals. We find, looking to the acts done, that the Company have converted the land for a considerable time into cuts and locks for the

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purpose of occupation and profit; who can entertain any doubt that they are to remain in that state, and not to revert to the proprietors? Then the Company have them and use them; and suppose they have them for nothing, what has that to do with rating? In the 47 Geo. 3, it is actually stated (*a*) that they have purchased the lands. I observe the argument of the Attorney-General has been chiefly addressed to the question of the towing-path, in consequence of the concession, that, if the rate is bad in that part, it cannot be supported; but as to that I am satisfied they are rateable. I find that the landowners' occupation of the towing-path is consistent with the occupation by the Company. By 43 Geo. 3, c. 129, s. 17, the owners of adjoining lands have an express right of way reserved to them, but only for the purpose of watering their cattle, as necessary to the occupation of their lands; and there is no other right of passage along the towing-path, except for the purpose of navigation, and where the course of it has been used of right as a common or private way. Therefore, upon the facts of this case, as to every part, there is a sufficient occupation to make them rateable.

COLERIDGE, J.—I entirely concur in the opinions that have been given, and the reasons for them. It is enough for me to say I am satisfied that the Company are occupiers of land, and unnecessary to go beyond that; they may or may not be purchasers. I am not influenced by the observation that no conveyance has been made; for the assessment of the jury, may, under these acts, be equivalent to a conveyance. Even granting the acts to be ambiguous, no one can say there is not evidence to make out exclusive occupation: and when, besides, you look at the two inquisitions, they clear up the whole matter; under the first they have taken the land for locks; and under the second, for towing-paths.

Judgment for the defendants.

(*a*) Sect. 17.

COURT OF EXCHEQUER.

In Hilary Term, 1840.

DAND

against

KINGSCOTE.

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January 29th.

TRESPASS.—The first count of the declaration charged the defendant with breaking and entering a close called Cuddy's Close, in the township of Amble, in the county of Northumberland, and four other closes, called Kirton's Moor, Frontfield, Clark's North Moor, and Creswell's Moor, in the township of Hauxley, in that county; and

By a deed dated in 1630, Sir W. H. and T. H. conveyed to H. L. and H. H. in fee-farm, certain lands in the township of A., "excepting always and reserved out of the grant all mines of coal within the fields and territories of A. aforesaid, together with sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits." The grantors covenanted for themselves, their heirs and assigns, "to give and yield to the said H. L. and H. H., their heirs and assigns, such accustomed recompense for digging and breaking the ground within the fields and territories of A. aforesaid, in which any pit or pits for the getting of coal should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases before." By a similar deed of the same date, the same grantors conveyed lands in the adjoining township of H. to other persons, R. B. and T. P., with a similar exception, reservation, and covenant.

Quære, whether this reservation of a sufficient way-leave in 1630 gives a right now to make a *railway*, with cuttings, embankments, and fences, so as to oust the occupier of the soil; but *held*, that it was not to be confined to such ways only as were in use at the time of the grant, and in such a direction as was *then* convenient.

And that a reservation of liberty to sink and dig pits, includes the necessary accessaries (engines, &c.) as incidents thereto:

But that under the reservation in the conveyance of lands in A. the coal owners had no right to carry coals got in H. over lands in A., although from part of the same mineral field.

In an action of trespass for making a railway over the plaintiff's close, the defendant justified under the above reservation of a way-leave: the plaintiff new assigned that the trespasses were committed on other and different occasions, and for other and different purposes, and to a greater extent than was necessary, and in other parts of the close. To this the defendant suffered judgment by default:—*Held*, that on these pleadings it was not competent for the plaintiff to contend that some species of railway was not within the reservation, but that the question was, whether the direction or mode of construction of the railway were authorized by the reservation; that is, such as were reasonably sufficient for the purpose of getting the coal.

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with making and continuing excavations and embankments, and laying a railroad thereon, and with committing other the trespasses on foot, and with horses, carts, and carriages, there enumerated. The second count charged the defendant with breaking and entering a close, called Clark's South Moor, in the township of Hauxley, in that county, and with committing similar trespasses, as enumerated in the said count; and also with making, in the last-mentioned close, pits and ponds, and with erecting houses, cottages, and engines, &c.

The defendants pleaded—First, as to the trespasses in the first count, with cattle other than with horses, mares, and geldings; and to the second count, except as to one pit, one shaft, one engine-house, and one edifice—Not guilty. To which the plaintiff entered a *nolle prosequi*.

Thirdly (*a*), to the trespasses in Cuddy's close in Amble—That Sir W. Hewytt and T. Hewytt being seised of Cuddy's close and other lands in Amble, and of all the veins and seams of coal under all the lands in the township of Amble, on the 23rd of November, 1630, by bargain and sale enrolled, granted to H. Lawson and H. Horseley, Cuddy's close and other lands in Amble in fee, excepting always and reserved thereout, all mines of coal within the said close, and also other the fields and territories of Amble aforesaid, together with *sufficient way-leave and stay-leave* to and from the said mines, together with liberty of sinking and digging of pit and pits for the winning of coal in Amble aforesaid. The defendant then deduced a title to the coal, with the reserved liberty from Sir W. Hewytt and T. Hewytt to the Dowager Countess of Newburgh, and then, as her servant, justified the trespasses in Cuddy's close, for the purpose of carrying away coals got in Amble. The plaintiff, by his replication, after admitting the seisin, deeds of bargain and sale, and title as deduced, replied

(*a*) The second plea was abandoned.

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de injuriâ absque residuo causæ, upon which issue was joined.

Fourthly, to all the trespasses in all the closes in Hauxley; that is to say, all the closes in the declaration, excepting Cuddy's close — That Sir W. Hewytt and T. Hewytt being seised in fee of those closes, and other closes and lands in Hauxley, and of all the coals under all the lands in the township of Hauxley, by indentures of bargain and sale enrolled, dated 23rd of November, 1630, conveyed to R. Brown and T. Palfrey in fee, those closes and other lands in Hauxley, excepting always and reserved thereout all mines of coal within the same closes, in which &c.; and all other the fields and territories of Hauxley aforesaid, with sufficient way-leave and stay-leave to and from the said mines, together with liberty of sinking and digging pit or pits for the winning of coal in Hauxley aforesaid. The defendant then deduced the same title from Sir W. Hewytt and T. Hewytt to the Countess of Newburgh, and justified sinking a pit and getting coals in Clark's South Moor, and making railroads, &c., for the conveyance of those coals got in Hauxley.

The plaintiff did not traverse this plea, but new assigned as to the trespasses in the third and fourth pleas, that the defendant committed those trespasses on other and different occasions, and for other and different purposes than those mentioned, and to a greater extent than was necessary, and in other parts of the closes.

The defendant pleaded to the new assignment, that the closes in the declaration were in, and parcel of, the manor of Amble; and that the late Earl of Newburgh was seised in fee of the manor, and veins, and seams of coal, with liberty to himself, and his heirs seised of the manor and the veins and seams of coal, of getting coal, and making pits in the lands of other persons, and making convenient and sufficient roads for carrying them away. The plea then stated a devise thereof

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to the Countess of Newburgh for life, and the defendant then justified, as her servant, getting the coals, and carrying them away under that liberty.

The plaintiff, by his replication to this plea, traversed the seisin of the manor and coals, and liberty as alleged, whereupon issue was joined; he also new assigned that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close. To which last new assignment the defendant allowed judgment to go by default (*a*).

The cause came on for trial at the Northumberland Summer Assizes, 1838, before *Alderson*, B., when the second plea to the declaration, and the plea to the first new assignment, were abandoned by the defendant, and a verdict was taken by consent for the plaintiff, the damages to be assessed by an arbitrator, according to the judgment of the Court, subject to the opinion of the Court on the following case:—

The plaintiff before and at the time of the trespass was and is seised in fee, amongst other lands, of the closes mentioned in the declaration. The closes called Kirton's Moor, Frontfield, Clark's North Moor, Creswell's Moor, and Clark's South Moor, are in the township of Hauxley; and the close called Cuddy's close is in the township of Amble, in the county of Northumberland. Whilst the plaintiff was in the occupation of the aforesaid closes, about the month of January, 1837, the defendant sank a pit in the close called Clark's South Moor, to get coals thereout, and erected upon the same close a building of stone, containing a steam-engine of fifty-horse power, for the purpose of drawing off the water, and raising the coal to the surface. The defendant also made a large pond, five feet

(*a*) A copy of the pleadings accompanied the case, to which each party was to be at liberty to refer on the argument, and also to the several deeds and other documents of title set forth in the pleadings.

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in depth and 158 feet in circumference for supplying the engine with water, and erected sheds and other works upon the same close. The shaft, engine, ponds, and sheds occupy altogether about two acres and a half of the land of Clark's South Moor. In the summer of 1839, the defendant caused a railway to be made from the pit in Clark's South Moor, for the transit of coals from that pit, which railway passed over that close, then across a public highway, then across Clark's North Moor, then across Kirton's Moor, then across Frontfield, all in the township of Hauxley; then across Cuddy's close in the township of Amble, and then for about a quarter of a mile over the lands of other persons in the same township, to a piece of land belonging to the Countess of Newburgh, adjoining to the Coquet, and likewise in the township of Amble. The defendant has constructed a staith for the purpose of loading the coals, brought along the railway from the pit, on board of vessels in the river Coquet, which is there a navigable river, at the distance of about 500 yards from the mouth, where it empties itself into the German Ocean. The pit in Hauxley is about a quarter of a mile from the nearest boundary of Amble. The coal seams lying in the latter township can be conveniently won by outstroke from the Hauxley pit, and raised to the surface by means of the shaft in Hauxley, the shaft being sunk so as to win from it the coals from both townships. There is an extensive field of coal within these townships, of which the seams dip to the east, and reach to the sea and the river Coquet.

The railway was completed about the month of October, 1837. It is made of iron, fastened upon stone pillars or sleepers, which are sunk into the soil. It is of the breadth of eight feet, and severed from the remainder of the close by wooden rails on both sides of it. These wooden rails are necessary for the protection of the railway, and to prevent cattle from straying upon it. The entire space of ground between the wooden rails averages in breadth

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thirty-five feet. In making the railway, the defendant has cut the soil and made embankments, and dug ditches on each side of the railway, and broken down hedges, separating the several closes from each other; and the defendant, by the wooden rails to fence the railroad and by the cuttings and embankments, has severed one part of each field from the other. The defendant also made embankments and cuttings in Clark's South Moor, and in Creswell's Moor, for another railway to the south-west of the pit opened in Clark's South Moor, which railway was afterwards abandoned. The engine erected by the defendant is necessary for winning and working the lower seams, which are the principal seams in his coal-field; and in erecting the steam-engine, and in other works of the colliery, he has expended about £20,000, for which expenditure there can be now no adequate return, unless by the profits from an export trade. There is a highway leading from Hauxley to Amble, which is crossed by the railway between Clark's South Moor and Clark's North Moor, and after the railway passes out of the plaintiff's closes, but before it reaches the staith, it crosses another highway; but the expense of conveying coals to the place of shipment, along either of these highways, would be such as to preclude the defendant from exporting without loss; the place of shipment on the river Coquet is well chosen, and the railway connecting it with the pit has been judiciously designed and constructed; no unnecessary ground has been taken, nor injury done, either in making the railway, or erecting the engine and forming the pond and other works connected with the colliery; and the defendant has been always ready to make compensation to the plaintiff, for the damages occasioned by the acts complained of. Railways, such as the defendant has laid down, are now in universal use throughout the counties of Northumberland and Durham, in the case of collieries. Since the completion of the railway, and before this action was commenced

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coals have been carried along it to a great extent, from the pit in Clark's South Moor, to the place of shipment in Amble. These coals have been exclusively the produce of the seams in Hauxley, but have passed by the railway, as well over the plaintiff's close in Amble, called Cuddy's close, as over his Hauxley closes; and large quantities of stone and wood for the purpose of the colliery, have also been carried along it, across the same closes.

The deeds, of which the following abstract is set forth, are to form part of this case:—

8th March, 1629—Indenture made between Edward Ditchfield, and other citizens of London, of the one part, and Sir William Hewytt and Thomas Hewytt (his son and heir), of the other part, being a conveyance, by the appointment of the corporation of London, of the "town of Amble in the county of Northumberland, with all rights, members, and appurtenances thereof, together with (*inter alia*) all those mines of coals there with the appurtenances; and also all that town of Auxley, with all rights, &c., *habendum* to Sir W. Hewytt and T. Hewytt, and the heirs and assigns of the said Sir W. H. for ever, to be held of our Lord the King, his heirs and successors, as of his manor of East Greenwich, by fealty only, in free and common socage, and not in capite nor by knight's service.

23rd November, 1630—Indenture of bargain and sale, duly enrolled and made between Sir W. Hewytt and Thomas Hewytt, of the one part, and Henry Lawson and Henry Horseley, of the other part, being a conveyance to the said Lawson and Horseley, their heirs and assigns, of certain lands and tenements in Amble, parcel of the premises before named; "excepting always and reserved out of this present grant all mynes of coales, within the fields and territories of Amble aforesaid, together with sufficient way-leave and stay-leave to and from the said mynes, with liberty of sinking and digging pitt and pitts," &c. *Habendum* to the said Lawson and Horseley, their heirs and

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assigns, in fee farm, to hold, of our Sovereign Lord the King (as before) rendering and paying, &c. Covenant from Sir W. Hewytt, "that he, his heirs and assigns, shall and will give and yield unto the said H. Lawson and H. Horseley, their heirs and assigns, such accustomed recompense for digging and breaking the ground within the fields and territories of Amble aforesaid, in which any pitt or pitts for getting of coale, shall hereafter happen to be sunk and wrought, as formerly hath been usually given and allowed there in like cases before."

23rd November, 1630—A similar indenture, being a conveyance by Sir W. Hewytt and T. Hewytt, to Richard Brown and Thomas Palfrey, "of lands and tenements in Hauxley," with similar reservation and covenant.

1st April, 1785—Indenture of lease made between Viscount Montague and Sir Herbert Mackworth, by the description of lords of the manor of Amble, of the one part, and John Widdington (through whom the plaintiff claims the several closes in the declaration mentioned), Edward Cooke and William Smith, of the other part, of all and every the coal mines, seam and seams of coal, belonging to the said lessors, lying and being within and under the lands, &c., of and belonging to them the said lessees and other persons therein mentioned, all situate and within the villages or townships of Amble and Hauxley, in the parish of Warkworth, manor of Amble, and county of Northumberland, aforesaid, to hold from the 1st May, 1785, for nine years, upon condition nevertheless, that they should not try for, dig, sink, win, or work the said mines or seams of coal, or in any manner impair or diminish the same, at the yearly rent of 21*l.* 5*s.* Similar covenants by the lessees.

The rent reserved by the last-mentioned lease was regularly paid. The defendant did all the acts above alleged to be done by him, claiming to do them under and by vir-

tue of an agreement by which Lady Newburgh granted to himself and Mr. Thomas Brown a lease for a term of years, of the coal mines and seams of coal in Amble and Hauxley, with the right to dig pits, and way-leave and stay-leave, and all other rights incidental and appurtenant thereto.

The term *stay-leave*, according to the custom and understanding of miners and other persons conversant with coal-mines, means a right in the coal owner of having a station where he may deposit his coals, for the purpose of dispensing them to the purchaser. This place of deposit and vend is, either at the pit mouth, or when detached, as is in the case of land sale collieries, at some station by a highway, and in the case of sea sale collieries, at a staith, trunk, or spout on somenavigable waters. *Way-leave* is the privilege of crossing land, for the supply of coals to the purchaser. This privilege is generally the subject of detailed contracts, specifying the particular direction and extent of the way-leave; and there is no usage or understanding amongst persons conversant with coal mines, by which to interpret the extent of the privilege, when conferred in the general terms used in the deeds above set forth. The narrowest enjoyment of a way-leave is when the sale is at the pit mouth, and the purchasers cross to the pit with their carts from the highway. Where the sale is at a detached station, the grantee of a way-leave generally sends coal to the station by means of a railway. In the case of sea-sale collieries, this is universally the mode of transit; and the railway is laid down in the most direct and commodious course, from the pit to the place of shipment, for which the coal owner can obtain leave from the land owners, without regard to the intervention of highways.

Coals have formerly been wrought for land sale in Amble and Hauxley, and for the supply of salt pans established there, and there are old shafts within these townships; but there never was any railway connected with these work-

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ings, nor had any steam-engine been erected in these townships for colliery purposes before that of the defendant. Railways were not in use in 1630; but unless there was a steam engine to drain the pit and raise the coals, and a railway and staith to ship them, the lower seams of the defendant's coal field could not be worked without loss, as has been before stated.

The plaintiff contends, that, on the above facts, he is entitled to a verdict upon the several issues raised in the cause. If the Court should be of that opinion, the verdict is to be entered accordingly, otherwise to be entered as the Court may direct. The defendant, under the above circumstances, contends, that he is justified by the exception or reservation in the before-mentioned indentures, or some of them, in making the railway over the several closes, and in doing the other acts in working the coals in Clark's South Moor. The plaintiff contends, that the reservations or exceptions in these deeds give sufficient way-leave to the nearest highway, in the direction the coals are to be taken from the pit, for the conveyance of the coals, and no further; and that the defendant had no right to make this railway or any road over the highway above mentioned through the lands of the plaintiff and the other persons; and that the defendant had no right, under the deeds, to carry the coals raised in Hauxley over Cuddy's close in Amble, or to make a railroad over that close for such a purpose. Moreover, the plaintiff contends, that the defendant had no right to make embankments or cuts, or sever the field as stated, or to lay a permanent railway as done by the defendant; and that the defendant had no right to erect a steam-engine and engine-house, or make the pond or the erections in question.

The question for the opinion of the Court is, whether the defendant to any and what extent has, under the circumstances above mentioned, exceeded his power and liberty; and the damages, if any, are to be assessed by the

arbitrator, according to the opinion of the Court, and the verdict and judgment to be entered up in pursuance thereof.

W. H. Watson, (*Cresswell* and *Otter* were with him), for the plaintiff (*a*).—The question is, whether under deeds reserving a way-leave and stay-leave, which is an easement, and only gives a right to go to the nearest highway, and that only over the natural surface of the land, the defendant had a right to make a railway at all, much less cut the land, make embankments, sever the fields, and exclude the owner entirely; for it has been held to be an actual ouster, *Doe* d. *Wawn* v. *Horn* (*b*), and that the grantee of such way-leave is rateable to the poor for the ground so inclosed, as having the exclusive occupation of it, *Rex* v. *Bell* (*c*). In Viner's Abridgment Chimin Private (D) 2, it is said, "If a way which a man has becomes not passable or becomes very bad, by the owner of the land tearing it up with his carts, and so the same be filled with water, yet he which has the way cannot *dig the ground to let out the water*, for he has no interest in the soil:" *Dike* v. *Dunston* (*d*). In the case of *Lord Darcy* v. *Askwith* (*e*), which was an action by a reversioner for waste in felling oaks, under the general words of the lease, *boscis, boscorum venditionibus, magno mæremio, magnis arboribus, mineris carbonum*, &c., the defendant pleaded "that he felled those trees for the purpose of making utensils in and about certain coal mines, parcel of the demise, and without which they could not dig and get the coals out of the pits, and did bestow the same trees accordingly,—whereupon the plaintiff demurred in law; the question was, whether by implication of law by leasing the coal

(*a*) Jan. 20th, before Lord *Abinger*, C. B., *Parke*, *Alderson*, and *Gurney*, Bs.

(*b*) 3 M. & W. 340.

(*c*) 7 T. R. 598.

(*d*) Godb. 52.

(*e*) Hob. 234.

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mines, the lessor gave power to fell trees for the use of the coal mines, for the grounds were agreed that the grant of a thing did carry all things included, without which the thing granted cannot be had. But this case was adjudged by the Court unâ voce against the defendant, for that ground is to be understood of things incident and directly necessary." *Pitt* v. *Lady Claverinth* (*a*) was more nearly in point. There one Wray was seised of a manor in which there was a great waste; he sold the manor, reserving to himself and his heirs a convenient way-leave such as he and his heirs should think proper for the carriage of coals through this waste, from certain coalworks of his to the river Tyne. There was an invention found out about twenty years before, which was used pretty much in the north at the time this manor was sold, of making waggon-ways, which was done by levelling ground from one place to another, and then laying planks into it for making a more easy and short conveyance of it. The defendant was lessee of some coal works under the heirs of Wray, and by virtue of the powers in the reservation, she made a waggon-way for her coals, upon which the plaintiff preferred his bill against her. The Chancellor made a decretal order, by which it was referred to the Barons of the Exchequer, to have their opinion, whether a waggon-way was within the reservation of a way-leave; and the Barons afterwards gave their opinion, that a waggon-way was not reserved. *Selby* v. *Adair* (*b*), is exactly in point. There the Vice-Chancellor held, that the reservation of a way-leave in a deed of 1630, did not give authority to make a railway. *Senhouse* v. *Christian* (*c*), is not in point. There the grant was of "a free and convenient way, as well a horseway as a footway, as also for carts, waggons, and other carriages whatsoever, in, through,

(*a*) 1 Barnard. 318. (*b*) 1818, not reported

(*c*) 1 T. R. 560.

over, and along a slip of land, with full and free license to make and lay causeways, for the purpose of carrying coals (amongst other articles);" and under it it was held, that the grantee had a right to lay a framed waggon-way. *Ashurst*, J., there says: "Under the original grant he has a right to make a framed waggon-way along the slip of land in question, which is necessary for the purpose of carrying his coals, *it being in the contemplation of the parties at the time of making this grant.*" The same principle governed *Gerrard* v. *Cooke* (*a*), namely, that a fair and reasonable construction ought to be put upon the words in a deed, giving, with a right of way, "all the liberties, powers, and authorities incident or appurtenant, needful or necessary, to the use, occupation, and enjoyment of the railway;" which words could have been inserted with no other view than rather to enlarge the right which the common law would give. That was evidently the intention of the parties in that case; but here they could not contemplate a description of way not known at the time of the grant; moreover, the covenant for compensation is for the *customary payments* before made, which had not been for a railway, and cannot now be made to apply to one. [Lord *Abinger*, C. B.—I cannot see why, if a person has a way-leave, he may not lay down iron rails.] He is taking them to a place where he has no right to do so—to land not purchased at the time of this grant. In Comyn's Digest, Chimin. (D. 5), it is said, "If a feoffor grants a way from D. to Blackacre, and the feoffee afterwards purchases lands adjoining to Blackacre, he cannot justify the using the way to those lands," citing *Howell* v. *King* (*b*). *Harris* v. *Ryding* (*c*) only shews, that, under a grant, reserving coal and other mines, "with free liberty of ingress, egress, and regress, to come into and upon the

(*a*) 2 N. R. 109. (*b*) 1 Mod. 190.
(*c*) 5 M. & W. 60.

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premises, to dig and get the mines," the reservation did not give a title to take all the mines, but only so much as could be got, leaving a reasonable support to the surface. The defendant, therefore, in this case, has no right to erect steam-engines and machines, or to make cuttings and embankments, thereby excluding the owner of the land from it by the improper exercise of what is merely an easement; at all events, the extent of the defendant's right to make a railroad could only be to the nearest highway, for the transportation of the coals to the place of sale.

Addison, (*R. Alexander*, and *Wightman*, were with him), contrà.—Under this reservation, the defendant has a right to make a railway, and to carry over Amble the coals got in Hauxley. As to the case of *Rex* v. *Bell* (*a*), it is opposed to *Rex* v. *Jolliffe* (*b*); at all events, the argument drawn from the rateability of railways, to prove that they oust the occupier of the soil, would as well apply to the water-pipes laid under ground by a company. *Doe* d. *Wawn* v. *Horn* (*c*), has reference only to a case of eviction or expulsion, and does not apply here, nor does the case cited from Viner's Abridgment, which was for the digging of trenches not averred to be necessary for the repair of the way, which would have been incidental to the grant. *Pitt* v. *Lady Claverinth* (*d*), is inconsistent with *Senhouse* v. *Christian* (*e*), and does not shew the grounds of the decision. It appears their Lordships applied to the Lord Chancellor, without success, to see the depositions made before the Court of Chancery, explaining the nature of a waggon-way; for they said, it was impossible for them to give an opinion upon this question without such evidence. The case of *Selby* v. *Adair*, which was cited to shew that, under a grant of way-leave, you may not make a waggon-

(*a*) 7 T. R. 598.
(*b*) 2 T. R. 90.
(*c*) 3 M. & W. 340; 5 M. & W. 564.
(*d*) 1 Barnard. 318.
(*e*) 1 T. R. 560.

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way, is not in point. That was a bill filed for a share of profits of coal mines, which had been received by the defendants, they and the plaintiff being tenants in common; the award there did not determine the extent of way-leave; and the question for the Master was, whether the defendants had any title other than as tenants in common with the plaintiff to the waggon-ways and the various other privileges afterwards mentioned; and the Master certified that they had. The question here is one of construction on the face of the deeds, what was the intention of the parties at the time the right was reserved. Here are mines under these townships, and an extensive coal-field; a right of way is reserved, and it is clear from stay-leave being added to way, it was intended for sale. Therefore, this is a right of way sufficient to enjoy those mines reserved, or rather excepted, incidental to the grant. The general principle in Sheppard's Touchstone (*a*) is, that "when anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also; and shall pass *inclusive*, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. *Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*" [*Parke*, B.—The cases you allude to are those of things incidental to the grant; that rule passes only *necessary* things, not *convenient*.] The rule is so laid down in 1 *Saund.* 322; then in *Roberts* v *Karr* (*b*), A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted on the broadest part of the road, but in the narrowest part a narrow slip of the grantor's land intervened between the road and the premises granted. It was held, that the grantor, and those claiming from him, were concluded from preventing the grantee coming out into the road over this strip of land; for that, even supposing he had had

(*a*) P. 89. 1. (*b*) 1 Taunt. 495.

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in his mind the intent to reserve this land, he could not, consistently with what appeared upon the face of those deeds.

In *Morris* v. *Edgington* (*a*), a lessee demised a messuage, consisting of two parts separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land in one of two directions, the one by entering it from the residue of the demised premises,—the other, and far the more convenient, by entering it from a public street; it was held, that the lessee was entitled to a way across the reserved land from the public street to that part: and Lord *Mansfield*, C. J., there intimates, that a way of necessity would probably be the way most convenient to the lessee. In *Hodgson* v. *Field* (*b*), A. and B., being severally seised of parcels of woody ground, and B. having other lands adjoining to his woody ground, and intending to make a colliery under his ground, A. grants to B., his heirs and assigns, liberty to carry up a sough or drain through A.'s woody ground, into B.'s woody ground, and also liberty for B., his heirs and assigns, to make two little sough pits in A.'s ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, and the other to be kept open for the purpose of examining the sough, so long as was necessary for that purpose, and no longer. It was held, that by this grant to B., the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto: "Any different construction (says Lord *Ellenborough*, C. J.), would but ill accord with the views of

(*a*) 3 Taunt. 24. (*b*) 7 East, 613.

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one who was about to open a colliery, intended to be worked as long as the coal might last." In *Gerrard* v. *Cooke* (*a*), A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage way; and gave him "all other liberties, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage," it was held, that, under these words, B. had a right to put down a flag-stone upon this piece of land in front of a door opened by him out of his house into this piece of land. [*Alderson*, B.—Suppose the way had led across a ploughed field, would he have a right to lay down the stone?] Yes, if the road could not be conveniently used without it. In *Abson* v. *Fenton* (*b*), which was a case under a private act of Parliament, for inclosing the waste lands of a manor, reserving to the lord and his assigns, "all mines, &c., together with all convenient *and* necessary ways, &c., then already made, or thereafter to be made, and liberty of laying waggon-ways, &c., at his and their free will and pleasure, and to do all such other works, acts, and things as might be necessary *or* convenient for the full and complete enjoyment thereof;" it was held, in an action of trespass for laying a waggon-way in an improper direction and manner, that the real question to be decided by the jury was, whether it had been laid in such a direction as a person of reasonable skill would have selected, and in such a mode as a prudent person would have adopted if he had been making the road over his own land, and not over the land of another. The same principle prevailed in the case of *The Earl of Cardigan* v. *Armitage* (*c*), pointing out the distinction between an exception and a reservation. In *Senhouse* v. *Christian* (*d*), *Ashurst*,

(*a*) 2 N. R. 109.
(*b*) 1 B. & C. 195.
(*c*) 2 B. & C. 197.
(*d*) 1 T. R. 560.

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J., says, "The question is, whether, under this general grant for the purpose of carrying coals, amongst other things, he has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom where they have not those framed waggon-ways; and the case itself expressly states that the defendant cannot so commodiously enjoy this way in any other manner; therefore, under the original grant, he has a right to make a framed waggon-way, which is necessary for the purpose of carrying his coals." It appears too, in that case, that at the time of the grant in 1722, framed waggon-ways were not in use; so here the reservation will be futile, unless there is power to make a railway. The covenant for compensation for digging and breaking the ground, would apply as well to the making of a road to the pits, as to opening the soil for the purpose of making those pits.

As to the carrying Amble coals over Hauxley, the deed of the 8th of March, 1629, includes both townships. The indentures of the 23rd of November, 1630, were simultaneous; and when those grants were made, the grantors had all the coals in both; and the mines under both are one mine.

The third plea must be found for the defendant. Under the new assignment, the plaintiff cannot raise the question as to the right to make the railway; it merely says, supposing you have justified the trespasses, the action is for trespasses on other and different occasions &c. than those mentioned in the plea. He has, therefore, admitted the right of making a railway, and only disputes the fact of its having been properly made. At all events, no real damage has been done; and, at the utmost, the plaintiff can only be entitled to nominal damages.

Watson in reply.—First, as to the new assignment, the

plaintiff is entitled to damages in respect of everything in which the defendant has exceeded his right reserved in the grant. The right to make a way for carrying coals is admitted by the new assignment; but what it puts in issue, is the *excess*, which could not have been done by traversing the right alleged in the plea.

The allegation in the third plea is, that the railway is made for the purpose of carrying away coals *got* (not *to be got*) in Amble; the defendant, therefore, has no right to make a way for such a purpose, especially as there is no present intention shewn in the case of getting coals there. Nor has he any right to carry those coals through Hauxley; the way reserved must be though Amble only, there being no mention of Hauxley in the deed, though containing coals as well as Amble.

As to the cases cited, they are not disputed; but it is contended, that they do not apply. They were all decided with reference to the peculiar words of reservation, and the circumstances of each particular case. The question is, whether the compensation clause cannot be supposed to apply to the making of ways; and if it could be made to refer to compensation for digging a way, it speaks of an *accustomed recompense*, which cannot allude to railways which were not then in existence. The case of *Abson* v. *Fenton* (*a*), included "all convenient and necessary ways, *then already made or thereafter to be made;*" and *Senhouse* v. *Christian* (*b*), was decided on the ground of the framed waggon-way being in the contemplation of the parties at the time of making the grant; so, in *Morris* v. *Edgington* (*c*), *Hodgson* v. *Field* (*d*), and *Gerrard* v. *Cooke* (*e*). In this case it is clear a railway was not contemplated; and, under any circumstances, the right of way extends no further than

(*a*) 1 B. & C. 195.
(*b*) 1 T. R. 560.
(*c*) 3 Taunt. 24.
(*d*) 7 East, 613.
(*e*) 2 N. R. 109.

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the reserved enjoyment of a way-leave, namely, the right to cross from the pits to the nearest highway.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—In this case, which was argued a few days ago, the Court were satisfied that the plaintiff was entitled to recover; but delayed giving their judgment, in order to look more attentively into the pleadings, and to ascertain exactly for what trespasses the plaintiff was entitled to compensation.

We entertained no doubt but that, under the exception of the deed of 1630 of the mines of coal in Amble, with the reservation of sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits, no easements were reserved except for the purpose of getting the coals under the lands conveyed, or, at all events, the coals within the territories of Amble. Whether the easement extended to the latter it is not necessary to decide.

In like manner the easement reserved by the deed of the same date, in respect of the coals in Hauxley, could be only exercised in respect of those coals only. It is impossible that the Court can give to these deeds an effect greater than the words are calculated to convey, in consequence of the contiguity of the two townships, and the circumstance that the coals in each were part of the same mineral field. It therefore follows that every trespass committed in Amble for the purpose of conveying coals got in Hauxley was unjustifiable, and the plaintiff is entitled to recover for them; he is therefore entitled to a compensation for every part of the railroad in Amble, and for the trespasses in carrying the Hauxley coals along it. The third plea, which justifies these trespasses under the deed of 1630, on which issue was taken, must be found for

the plaintiff, as the allegation in that plea, that it was convenient and necessary to make a road or way in the closes in Amble *at the time when it was made*, to convey coals got in Amble, was not proved. The second plea, founded on a supposed manorial custom, as also the special plea to the first new assignment, were also unsupported by the evidence.

It remains, therefore, to consider for what trespasses in Hauxley the plaintiff is entitled to recover. Those complained of are—First, the making of a steam-engine and pond for supplying it, and an engine-house and buildings. Secondly, the making of a framed rail-road of iron on stone pillars or sleepers, from the pit in Hauxley direct to the boundary of Amble, to communicate thence with the river Coquet, with ditches and wooden rails on each side embracing a width of thirty-five feet, and the construction of embankments and cutting the soil, in order to make a *level* railroad. Thirdly, the making of embankments and cuttings in two other fields for a railroad, which was abandoned.

It will be proper to take these several heads of damage in their order.

First, as the coals in all the seams are excepted, and a right to dig pits for the purpose of getting those coals reserved, all things that are depending on that right and necessary for the obtaining it are reserved also, according to the rule in Sheppard's Touchstone, (p. 100). Consequently, the coal owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines and draw the coals from the pits. The case finds that the steam-engine which was erected was *necessary* for the winning and working the lower seams, whic hare the principal seams in that coal field; and therefore the defendant had a right to erect it.

The pond for the supply of the engine, and the engine-house, seem to have been necessary accessaries to such

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an engine, and were therefore lawfully made: but whether the sheds were is not stated; and if there be a question as to them, the arbitrator may determine it. It may not be improper to observe, that a compensation seems to us to be due for the injury to the soil by making these adjuncts to the pit, the steam-engine, and its accessaries; as well as for digging the pits themselves, under the provision in the deed of 1630. Whether there is any due for the railroad is doubtful.

The second head of damage is the construction of the railway to the boundary of Amble, the inclosing of it, and the cutting of the soil.

Upon referring to the fourth plea, and the new assignment upon it (for it is not traversed), it appears to us, that it is not open to the plaintiff to contend, in this action, that *some* species of railroad made with stone, iron, and wood, was not convenient, proper, and necessary, under the terms of the reservation; not that it was not necessary to cut the soil, for the purpose of making it level, and to make a mound or embankment. These facts are all averred in the plea, and are not traversed; and the effect of the new assignment is, not strictly to *admit* the truth of these facts, but to withdraw them entirely from consideration as the subject of the action, and to preclude the plaintiff from complaining of them (*a*); and the true grounds of complaint are to be sought in the explanation of the declaration contained in the new assignment. These are for trespasses on other occasions, of which the special case supplies no proof; and for trespassing to a greater extent than was necessary for exercising the reserved rights, and in parts of the close where there was no right of way-leave.

This renders it necessary to look at the facts found in the case, to ascertain whether the railroad was constructed

(*a*) *Norman* v. *Westcombe*, 2 M & W. 360.

in a direction or in a manner unauthorized by the reservation.

This reservation is to be construed, according to the rule laid down in Sheppard's Touchstone, p. 100, in the same way as a grant by the owner of the soil of the like liberties; for what will pass by words in a grant will be excepted by like words in an exception. How the reservation is of the right to dig pit or pits, (which pits are mentioned in the compensation clause to be such as may thereinafter *happen* to be sunk), and of *sufficient* way-leave and stay-leave connected with those pits. There is no doubt that the object of the reservation is to get the coals *beneficially* to the owner of them; and therefore it should seem, that there passes by it a right to such a description of way-leave and in such a direction, as will be reasonably *sufficient* to enable the coal-owner to get from time to time all the seams of coal to a reasonable profit; and therefore, the owner is not confined to such description of way as is in use at the time of the grant, and in such a direction as is then convenient.

Adopting this rule of construction, the only question is, whether the direction or mode of construction of the railroad were reasonably sufficient, for the purpose of getting the third seam of coal in a manner beneficial to the coal-owner.

Upon the facts found in the case, we have some little difficulty in determining these questions satisfactorily. It is found that "without a railway *for the shipment*, the lower seams could not be worked without loss, *as before stated*," and the statement before made is, that "£30,000 was expended on the steam-engine, &c., and that *for that expenditure* there could be no adequate return unless by the profit of an export trade." If it is meant (as probably it was) that this sum was necessarily expended in order to work the lower seams in a reasonably beneficial manner; and therefore, that a railway for shipment was necessary for the fair working of those seams, we cannot say that

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there has been anything improper in the direction or mode of construction of the railway. The direction was proper, in constructing a railway for shipment, though it led to a place where the defendant was a trespasser, inasmuch as it was convenient *for the purposes of the coal mine*, which was the meaning of the reservation, and which is the only thing to be looked to in construing it; and whether the defendant would be liable to make amends for wrongful acts in constructing the railroad in another part of the same line, does not appear to be material, so long as the railroad remains unobstructed and capable of being used in that place. The true question is, whether the entire railroad is convenient. When it is obstructed (as it may be by the owner of the soil in Amble) and ceases to be passable, it will be no longer convenient for the purposes of the mine, and the part in Hauxley will not be lawfully used. The direction, therefore, was proper. Nor, upon the supposition that a railway for shipping was necessary, can we say that there was any excess in the mode of construction; for the case finds that the railroad has been judiciously designed and constructed, and that no unnecessary ground has been taken or injury done in making it. The fences and ditches to the railway do not appear to have been found by the arbitrator to be necessary; and therefore in respect of these the plaintiff is entitled to recover. These observations will enable the arbitrator to assess the compensation.

The only remaining head, is the damage by the partial construction of the abandoned railway. The defendant has by his conduct shewn that a railway in that direction was unnecessary; and the plaintiff is entitled to recover for the damage occasioned by it.

Judgment for the plaintiff accordingly.

COURT OF EXCHEQUER.

In Hilary Term, 1840.

HEBBLEWHITE against M'MORINE.

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Jan. 31st.

ASSUMPSIT.—The declaration stated, that whereas heretofore, to wit, on the 10th of September, 1838, it was agreed by and between the plaintiff and defendant, in manner following, that is to say; that the defendant had that day purchased from the plaintiff fifty shares in the Brighton Railway Company, to be transferred and delivered and paid for on or before the 1st day of March, 1839, or at any intermediate date that the defendant might require them, by paying the plaintiff for the said shares at par per share, together with all calls that might

The London and Brighton Railway Act (1 Vict. cap cxix. s. 155) provides, that the form of conveyance of shares shall be by writing, duly stamped, under the hands and seals of the parties, and that on every sale the *deed* or *conveyance* shall be kept by the Company, and an entry of the memorial of such transfers and sale shall be indorsed on the said *deed* of sale or transfer. Section 157 provides against any transfer of shares till all the calls on them are paid.

The plaintiff in September having agreed to sell to the defendant fifty shares to be delivered on the 1st of March, bought of R. W. P. (through brokers) fifty shares to be delivered on the 15th of December next, on which day R. W. P. delivered to him fifty certificates and three transfers for shares with blanks for the purchaser's name, the consideration, and the date. On the 1st of March the plaintiff tendered these certificates and transfers to the defendant, who refused to accept them; at that time there were some calls due, but that objection was waived.

To an action brought to recover the difference of price between December and March, the defendant pleaded (amongst others), 1. That the plaintiff was not ready to transfer the fifty shares to him, nor offered to execute to him or his nominee *a legal transfer* of them. 2. That the plaintiff was not at the time of the agreement the proprietor of the fifty shares, and had no good right or title to execute a legal transfer of them. 3. That, at the time of the said contract, the plaintiff was not possessed of or entitled to, nor had entered into any contract for the purchase of, nor had any reasonable expectation of becoming possessed of or entitled to, any such shares, otherwise than by afterwards purchasing them. (This last plea was held bad on general demurrer).

Held, that the form of conveyance required by the statute is a *deed*, and that an instrument of transfer executed by the owner of the shares, with a blank for the name of the purchaser, and delivered to the plaintiff, by whom on the sale of them, the name of the purchaser was to be inserted, was void;

And that the non-payment of the calls would have been a valid objection, but that a waiver of it by parol was sufficient to remove it.

Semble, that the plaintiff could not give the defendant an implied covenant for title, R. W. P. being the actual owner of the shares.

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have been paid on the same by the plaintiff, thereby binding himself, his executors and assigns, to execute to the defendant, or his nominee or nominees, a legal transfer of the said shares, for which the defendant was to make payment to the plaintiff on or before the 1st day of March, 1839: And it was understood and agreed, that the defendant should be entitled to all new shares that might accrue or be appropriated to the holder of the said fifty shares. It was also agreed, that if the payment was not made on the 1st day of March, 1839, that the plaintiff reserved full power to resell the said fifty shares at the defendant's cost and risk, claiming from him any deficiency, or accounting to him for any surplus that might arise from the sale thereof; and the said agreement being so made, afterwards, to wit, on the day and year aforesaid, in consideration, that the plaintiff, at the request of the defendant, had promised the defendant to perform and fulfil the said agreement in all things to be done and performed by the plaintiff in that behalf, he, the defendant, promised the plaintiff to perform and fulfil the same in all things on the part of the defendant to be done and performed. And the plaintiff saith, that the defendant did not require the said fifty shares to be transferred and delivered to him at any time before the said 1st day of March, 1839, and that no new shares had accrued or been appropriated to the holder of the fifty shares before the resale thereof by the plaintiff hereinafter mentioned; and that, on the said 1st March, and from thence until the resale thereof, &c., he, the plaintiff, was ready and willing to transfer and deliver the said fifty shares to the defendant if the defendant would then have paid for the same, of which the defendant during all that time had notice. And then, to wit, on the said 1st March, in the year aforesaid, he the plaintiff offered the defendant to execute to the defendant, or any nominee or nominees of the defendant, a legal transfer of the said shares, on payment by the defendant for the said shares according to the

said agreement and the promise of the defendant in that behalf; but the defendant did not nor would, then or at any time before the said time of reselling the same hereinafter mentioned, accept and pay for the said shares, but altogether refused so to do; whereupon the plaintiff, after the said 1st day of March, and after such refusal and non-payment by the defendant, to wit, on the 6th day of March, in the year aforesaid, resold the said shares, and upon such resale there was a deficiency and loss to the plaintiff, amounting, together with the costs of reselling the same, to a large sum of money, to wit, the sum of 256*l.* 6*s.* 0*d.*, of which the defendant afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested to pay and make good the said deficiency amounting as aforesaid; yet the defendant hath not as yet paid the said last-mentioned sum of money, or any part thereof, to the plaintiff, but hath altogether refused and still doth refuse to pay the same, or any part thereof. Account stated.

Pleas—First, non assumpsit.

Secondly, that the plaintiff was not ready and willing to transfer and deliver the said fifty shares to the defendant if the defendant would have paid for the same, nor did the plaintiff offer to the defendant to execute to the defendant, or any nominee or nominees of the defendant, a legal transfer of the said shares, on such payment as in the said first count in that behalf mentioned, in manner and form as in the said first count alleged.

Thirdly, that after the time of making the supposed agreement in the first count mentioned, or at any time between that day and the time of making the supposed agreement in that count mentioned, the plaintiff was not the proprietor of the said fifty shares in that count mentioned, or of any of them, nor had he good right or title to execute a legal transfer of such shares, or of any of them, according to the said agreement in that behalf.

Fourthly, as to the supposed breach of promise in the said first count lastly mentioned, the defendant says, that

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the plaintiff did not re-sell the said shares, or any part of them, in manner and form as in that count alleged.

Fifthly, as to the supposed breach of promise in the said first count lastly mentioned, the defendant says, that upon the supposed resale in that count mentioned, there was not a deficiency or loss in manner or form as in that count alleged.

Sixthly, (added after the issue was made up), that at the time of the making of the agreement in the said first count mentioned, and of the mutual promise therein mentioned, he, the plaintiff, was not possessed of or entitled to the said fifty shares in the Brighton Railway Company, in the said first count mentioned to have been purchased by the defendant from the plaintiff, nor any of them, nor had the plaintiff at that time entered into any contract for the purchase of such fifty shares in the Brighton Railway Company, or any of them, nor had he at that time any reasonable expectation of becoming possessed of or entitled to any such shares in the said Brighton Railway Company, within the time by the said agreement provided for the fulfilment thereof by the plaintiff, otherwise than by his, the said plaintiff's purchasing such shares, after the time of the making of the said agreement.

General demurrer and joinder in demurrer to this plea (*a*).

Replication, traversing the third plea, and joining issue on the rest.

On the trial, before *Gurney*, B., at the Exchequer Sittings at Westminster, 14th June, 1839, it was proved, on behalf of the plaintiff, that on the 10th September,

(*a*) The plea was disallowed (see 5 M. & W. 462), the Court being of opinion that such a contract for the sale of goods to be delivered at a future day, is not invalidated by the circumstance, that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivering them, otherwise than by purchasing them after making the contract.

1838, he sold fifty London and Brighton Railway shares through J. G., his broker, to the defendant. The following contract was signed by the defendant, and a similar one by the plaintiff:—

"Mr. Hebblewhite,

"I have this day purchased from you fifty shares in the Brighton Railway Company, to be transfered, delivered, and paid for, on or before the 1st March, 1839, or at any intermediate date that I may require them, by paying you for the said shares at par per share, together with all calls that may have been paid on the same, you hereby binding yourself, your heirs, executors, and assigns, to execute to me or my nominee or nominees a legal transfer of the said shares, for which I am to make payment to you on or before the 1st March, 1839. It is understood and agreed that I shall be entitled to all new shares that may accrue or be appropriated to the holder of the said fifty shares. It is also agreed, if the payment be not made on the 1st March, 1839, that you reserve full power to re-sell the said fifty shares at my cost and risk, claiming from me any deficiency, or accounting to me for any surplus that may arise from the resale of them.

"Yours, &c.,

"Witness, J. F. G. M'MORINE."

That upon this contract being entered into, the plaintiff purchased, through his broker, on the 12th September, fifty shares from the broker of a Mr. *Pritchard*, to be delivered on the 15th of December then next. On that day the plaintiff received fifty certificates in the name of *R. W. Pritchard*, together with three transfers from him, with blanks left for the name of the purchaser, the consideration, and the date. An objection having been made by R. W. P.'s broker, to give up the transfer without the name of the transferee, it was arranged that he should retain possession of them till the appointed time for deli-

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very, in March, and in the meantime the plaintiff was not to be called upon to have the shares transferred into his own name.

That on a sale of shares it is the custom for the purchaser to take the certificates and transfers to be recorded in the books of the Company, and upon his so doing, and the calls having been paid up, he may at any time have the shares registered in his own name; but until the calls are so paid, it is not the practice to insert another's name in the books, and the Company look to the original proprietor for the calls. That these shares at the time of the sale to the defendant, and the purchase of them by the plaintiff, stood in the name of Pritchard, and that calls to the amount of £11 per share had been made, some of which had not been paid up. A further call of £5 was made in February, which, however, at the defendant's request, was not paid by the plaintiff.

That on the 1st March the shares being due, the certificates and transfers were tendered to the defendant for acceptance and payment; he admitted the tender, but then refused to accept the shares.

The following is a copy of one of the transfers tendered:—

"Transfer, No.

London and Brighton Railway Company.

I, R. W. Pritchard, of Liverpool, in consideration of the sum of paid to me by of do hereby assign and transfer to the said twenty fifty-pound shares, numbered 31,715 to 31,734, both inclusive, of and in the undertaking called the London and Brighton Railway, to hold unto the said executors, administrators and assigns, subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said , do hereby agree to take and accept the said shares, subject to the conditions aforesaid. As witness

our hands and seals this day in the year of our Lord, 1839."

"Signed, sealed and delivered by the said R. W. Pritchard, in the presence of R. Cobb. } R. W. PRITCHARD, (L.S.)

Signed, (L.S.)

"A memorial, &c."

On the 6th March the shares were sold by the plaintiff at the market price, then being 5*l.* 2*s.* 6*d.* discount; upon which this action was brought to recover the difference, 256*l.* 6*s.* 0*d.* The jury found a verdict for the plaintiff for the amount claimed (*a*). In Michaelmas Term *R. Alex-*

(*a*) The clauses of the act relative to certificates and transfer of shares are as follows:—

Section 140. "And be it further enacted, That the said Company shall, and they are hereby required, at their first or some subsequent meeting, and afterwards from time to time, to cause the names of the several corporations, and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become, entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company; and after such entry made, to cause their common seal to be affixed thereto; and the said Company shall from time to time cause a certificate or ticket, with the common seal of the said Company affixed thereto, to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking; such proprietor paying to the said Company the sum of two shillings and sixpence, and no more, for every such certificate or ticket, and such certificate or ticket shall be admitted in all Courts whatever as primâ facie evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein specified; but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof; and such certificate or ticket may be in the words, or to the effect following (that is to say)—

"London and Brighton Company,

"No.

"These are to certify, that A. R. of is the proprietor of the share [or shares], No. , of the

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order obtained a rule *nisi* for a new trial, upon the ground, that none of the provisions of the 1 Vict. c. cxix, ss. 140,

London and Brighton Railway Company, subject to the rules, regulations, and orders of the said Company.

"Given under the common seal of the said Company, the day of in the year of our Lord ."

Section 142. "That the said Company shall, in some proper book to be provided by the said Company for that purpose, enter and keep a true account of the names of the several corporations, and of the names and places of abode of the several persons who shall from time to time be entitled to any share in the said undertaking, &c."

Section 155. "That it shall be lawful for the several proprietors of the shares of the said undertaking, and their respective executors and administrators and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned, and the form of conveyance of shares shall be by writing duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties, as the case may require, (that is to say):—

"I, A. B., of , in consideration of the sum of paid to me by C. D., of , do hereby assign and transfer to the said C. D. my share [or shares] numbered of and in the undertaking called the London and Brighton Railway, to hold unto the said C. D., his executors, administrators, and assigns, [or successors and assigns], subject to the several conditions on which I held the same immediately before the execution hereof, and I the said C. D., do hereby agree to accept and take the said share [or shares] subject to the conditions aforesaid: as witness our hands and seals the day of ."

"And on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or by the secretary or clerk of the said Company; who shall enter in some book, to be kept for that purpose, a memorial of such transfer and sale; and indorse the entry of such memorial on the said deed of sale or transfer; for which entry and indorsement the sum of two shillings and sixpence, and no more, shall be paid to the said Company: and the said secretary or clerk is hereby required to make such entry or memorial accordingly, and, on demand, to make an indorsement of such transfer on the certificate of each share so sold; and deliver the same to the purchaser for his security; for which indorsement no more than two shillings and sixpence shall be paid, and such indorsement, being signed by the said secretary or clerk, shall be considered in every respect the same as a new certificate; and until such memorial shall have been made and entered as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said un-

142, 155, had been complied with by the plaintiff, and that, therefore, he had not the legal title denied by the plea, and previously asserted in the declaration; that Pritchard was the proprietor of the shares, not the plaintiff, although he undertook to be so; that there were calls remaining due which must be paid by Pritchard, and that being the case, by section 157 of the statute, the shares could not be transferred. He cited *Hare* v. *Waring* (*a*), as to the proof of proprietorship and tendering the certificates, which ought to shew title in the person offering them.

Cresswell and *Cowling* shewed cause (*b*).—The third plea is not proved, the plaintiff might not be proprietor, but he was entitled to transfer shares, *Stowell* v. *Robinson* (*c*). The defendant must support both parts of his plea, proprietorship and title, because he makes both his defence, and both are necessary to constitute a defence; executing a transfer does not mean that he will execute a *deed* of transfer, and if it does, it only implies that it shall be done by all the necessary parties, and if others who are the legal owners execute it, they do it as trustees for the plaintiff, and that is sufficient, 1 Wms. Saund. 234 *c* (6). *Woodward* v. *Cotton* (*d*). The distinction in *Hare* v. *Waring* is, that it depended on the plaintiff, who had taken upon himself to aver that he was the proprietor; here it is the converse, and there is nothing about the certificates in the issues.

dertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking."

Section 157. "No person or corporation shall sell or transfer any share which he or they shall possess in the said undertaking after any call shall have been made for any sum of money in respect of such share, unless he or they at the time of such sale or transfer shall have paid the full sum of money which shall have been called for in respect of such shares."

(*a*) 3 M. & W. 362.

(*b*) 14th Nov., 1839, before *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

(*c*) 3 B. N. C. 928.

(*d*) 1 C., M., & R. 44.

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But this instrument is not a deed, nor is the transfer required to be by deed. The statute requires it to be by *writing* duly stamped (section 155); it gives a form, and says the *deed or conveyance* shall be to the like effect. It is not necessarily a deed because sealed, although the statute makes imperative to put the seal to it; and suppose the parties had signed and sealed an instrument of this sort, are they to deliver it? for that is of the essense of a deed. To whom is it to be delivered? The seller and purchaser are both to seal; are they both to deliver it; is it to be the deed of both? It is to be kept by the secretary of the Company; the seller will not part with his interest unless he has a transferee, who will assume all the liabilities to the Company which the seller originally incurred, and the transferee receives them subject to those liabilities; therefore the purchaser will not deliver it till it has been delivered to him by the vendor, who will not do so till the purchase is completed. As to the stamp there is no difficulty; all contracts are as good without a stamp as with one, except for the sake of making them evidence. This follows from the fact that they may, with the exception of policies of insurance, receipts, bills, and notes, be stamped upon payment of a penalty afterwards. That an instrument which derives its validity from signing and sealing may be delivered so far in blank, is clear from the practice of the Courts. Writs and subpœnas are frequently sealed in blank, bills of exchange accepted, and mercantile contracts signed, delivered to the persons who have to deal with them, and being afterwards filled up become valid and effective instruments; here the signature is an authority to the person receiving it, to fill up the paper with any signature he may think fit. The seller says these shares shall be the property of any person who chooses to put his name there, and the grantee need not be fixed upon at the time a grant is made; for "a grant to a person uncertain may be good, if it be ascer-

tained in the life of the grantor: as, a grant to him who shall come first to St. Paul's the next day, if the grantor does not die before any one comes there; for if any one capable come there, he shall take." Com. Dig. "Grant" (B. 1), and see *England* v. *Roper* (*a*). But supposing this instrument to be a deed; a deed executed in blank and delivered to a person to be handed over to the party to be benefited by it, when delivered over is a good and valid instrument. *Texira* v. *Evans* (*b*). This is the case with navy bills which are negotiated in this way, and deeds of joint stock companies, or of composition with creditors, See the observations of *Popham*, J., in *Hudson* v. *Revett* (*c*). citing *Markham* v. *Gonaston* (*d*). These cases are inconsistent with the passage in Buller's Nisi Prius, 267, referring to *Pigot's case* (*e*), that "if there be blanks left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered;" nor if *Pigot's case* be traced to its conclusion, does it warrant this doctrine, on the authority of which this objection has been supposed to be valid. See 2 Roll. Abr. 29, pl. 2, 3. In *Jennings* v. *Bragg* (*g*) where a disseisee out of possession made a lease for years, and delivered it as an escrow to a stranger, who delivered it upon the land as the deed of the lessor; *Anderson*, J., said it was a good lease, for it was not his deed until the second delivery, at which time he had good right and power to let it; and this case is cited as good law in *Butler and Baker's case* (*h*). In *Doe* d. *Lewis* v. *Bingham* (*i*), where in a deed by which a mort-

(*a*) 1 Starkie, 304, where Lord *Ellenborough*, says, "If the defendant has been foolish enough to sign the bond in blank, he must take the consequences."

(*b*) Cited by *Wilson*, J., in *Master* v. *Miller*, 1 Anstr. 228.

(*c*) 5 Bing. 368.

(*d*) Cro. Eliz. 626; Moore, 547.

(*e*) 11 Rep. 27.

(*g*) Cro. Eliz. 447; 3 Bulstr. 215.

(*h*) 3 Rep. 35.

(*i*) 4 B & A. 675.

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gagee conveyed to the mortgagor the legal estate, and at the time of his executing it there were several blanks, but not in the part which affected him, *Bayley*, J., said, "The whole deed may be considered as one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties." In fact it is considered as one transaction of several parts. See also, *Bradley* v. *Holdsworth* (*a*), *Thompson* v. *Rock* (*b*), *Weeks* v. *Maillardet* (*c*), *Murray* v. *The Earl of Stair* (*d*), *Watson* v. *Booth* (*e*), *Johnson* v. *Baker* (*g*), and Sheppard's Touchstone "Deed," 56. If this were the case of a person accepting blank bills of exchange, he would be liable when the blanks were filled up, because by accepting he undertakes to pay whatever sum of money is filled up there. *Schultz* v. *Astley* (*h*), *Russell* v. *Longstaff* (*i*). The case in Com. Dig. "Fait." (F. 1), is only a quotation of one of *Perkins' Queries*, and the authority in *Powell* v. *Duff* (*k*) only an *obiter dictum* as to a bail bond, which the sheriff can only take in one particular way under 23 Hen. 6, c. 9, otherwise it is void. The others are questions of variance only. The case of *Murray* v. *The Earl of Stair* (*l*) raises the distinction between a deed delivered absolutely or as an escrow, and on this and the other authorities, the plaintiff is justified in saying this was a sufficiently valid instrument to enable him to tender and offer to transfer the shares, which was all he was bound to do. To constitute an escrow there need be no declaration at the time of delivery, that depends on the circumstances of the case; the transfer cannot be effected till the name of the transferee is inserted, and then it is valid.

(*a*) 3 M. & W. 16.
(*b*) 4 M. & S. 338.
(*c*) 14 East, 568.
(*d*) 2 B. & C. 82.
(*e*) 5 M. & S. 223; 5 Bing. 376.
(*g*) 4 B. & A. 40.
(*h*) 2 B. N. C. 553.
(*i*) Dougl.
(*k*) 3 Camp. 181.
(*l*) 2 B. & C. 82.

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R. Alexander and *Tomlinson*, contrà.—This transfer would be void at common law, independently of the statute, which throws every impediment in the way of shares being transferred to bearer; it is not a question of waiver, but a positive allegation of an offer to execute a legal conveyance. [*Rolfe* B.—May you not execute a deed leaving out parcels?] But it is not valid if you leave out material parts, as the parties. If so, real estate might pass to bearer, and names be filled up afterwards. The plaintiff can only put his case two ways; did Pritchard intend to execute this deed to any one in particular, or as a blank to be filled up at any time? If in favour of any particular individual, that name should have been inserted, or a new deed was necessary and should have been offered: if it was to be filled up by any one it was originally void: Com. Dig. Fait. A. 1: *Powell* v. *Duff* (*a*), *Weeks* v. *Mayler* (*b*). It would also require a new stamp. Nobody can doubt, after reading the words of this act, that the instrument by which the shares are transferred is a deed. [*Alderson*, B.—The difficulty is, that you are carrying out all the consequences of the act's calling it a *deed*; if it is not one in contemplation of law the statute cannot make it so; it is essential to a deed to be delivered; here the real party to whom it is to be delivered is the Company, to enable them to give to the purchaser the right of a partnership with them.] The operation of completing a conveyance, to which the Company is a party, makes it more stringent as a deed: it not only has the requisites of a deed, but the additional obligation to the Company. [*Rolfe*, B.—Look at the different language used in the 160th section as to mortgages, where it is not said *by writing*, but *by deed duly stamped*; and that in section 150, which gives the power to vote by proxy, which must be in writing; by this it appears they make a distinction in the terms.] The ex-

(*a*) 3 Camp. 181. (*b*) 14 East, 568.

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pressions *deed* and *conveyance* relate to the same transfer, but are not synonymous; the word *deed* relates to the form, and *conveyance* to the effect of the instrument; if a party pleads an agreement in writing to a declaration in covenant, the plea would be bad on demurrer, not if it said *sealed with the seal*, because the Court would conclude from those words that it was a deed; the same legal construction ought to be put on these forms, by taking the palpable words of the legislature used in the act, and putting upon them the legal interpretation of the Courts.

Then, assuming a deed to be required, deeds executed in blank or altered materially after execution are void: *Hudson* v. *Revett* (*a*). There are several classes of cases relied on by the other side, in all of which there is a distinction. In *Pigot's case* (*b*) the variance was that the schedule, required to be annexed, was improperly added after one of the parties had left the room. In *Powell* v. *Duff* (*c*) if it had been proved the blanks had been filled up afterwards, the ruling might have been different. [*Parke*, B.—That case amounts to nothing; that is on the presumption, in the absence of evidence to the contrary, that every thing is done right.] The other cases are exceptions to the general rule, and tend to confirm it. Where a deed executed by one or more is altered in a part not affecting the interests of those who have executed, but only that of those about to do so, it is not invalid: *Doe* d. *Lewis* v. *Bingham* (*d*). *Hall* v. *Chandless* (*e*) was a case of another obligor added; that only affected the others by benefiting them, the portion altered was not their portion. Another class is where something at the time of execution cannot be ascertained and is supplied afterwards, as was the case in *Hudson* v. *Revett* (*g*), and *Johnson* v. *Baker* (*h*); *Texira* v.

(*a*) 5 Bing. 259.
(*b*) 11 Coke, 37.
(*c*) 3 Camp. 181.
(*d*) 4 B. & A. 672.
(*e*) 4 Bing. 123.
(*g*) 5 Bing. 368.
(*h*) 4 B. & A. 440.

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Evans (*c*) is not an original report, and is difficult to be reconciled with the others, as it goes much beyond them; but even that is distinguishable, and so is the case of the person coming first to St. Paul's; that deed pointed to one transaction, it was to relate to the first person who would lend the money, not to be hawked about the Stock Exchange to be filled up months afterwards. If this is good, a conveyance of land might be executed in blank, transferred through fifty holders, and filled up by the last purchaser.

Cur. adv. vult.

PARKE, B.—In this case, which was argued last term upon shewing cause against a rule for a new trial, we are of opinion that the rule must be made absolute.

It was an action brought by the plaintiff to recover damages for not accepting and paying for fifty shares in the Brighton Railway, which, by the contract, were to be transferred, delivered, and paid for on or before the 1st of March, 1839, or at any intermediate date that the defendant might require them, by paying for them at par, together with all calls that might have been paid on the same; the plaintiff binding himself to *execute* to the defendant or his nominee, a legal transfer of the shares on or before the 1st of March. The declaration avers, that, on the 1st of March the plaintiff was ready and willing to transfer the shares, if the defendant would have paid for the same, and that he offered to the defendant, or any nominee of the defendant, a legal transfer. This averment was traversed in one plea, and in another it was pleaded, that, at the time of the agreement, or the 1st of March, or between those times, the plaintiff was not the proprietor of the shares, nor had he good right or title to execute a legal transfer of such shares, according to the agreement. The replication states, that, on the 1st of March the plain-

(*a*) 1 Anst. 225.

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tiff was the proprietor of the shares, and then had good right and title to execute a legal transfer thereof. The questions for consideration arise on these two pleas. Upon one or both the title of the plaintiff to make the transfer may be questioned: it is not material upon which; but there seems no doubt but that it may, on the traverse of readiness to convey, which must involve the capacity to do so, as there is no other averment in the declaration, which expresses or implies that the plaintiff had a title to convey on the 1st of March.

It appeared on the trial, that, between the date of agreement and the 1st of March, some instalments became due, which the plaintiff did not pay; and on the 1st of March (before which day the defendant had not desired any transfer) the plaintiff's broker, who had purchased fifty shares from one Pritchard, produced to the defendant a conveyance executed by Pritchard, of these shares, with a blank for the name of the transferee, and offered to fill it up with that of the defendant or his nominee, on the defendant's paying the price. The defendant refused to do so. The plaintiff sold the shares, and the action was brought for the difference.

The objections to the plaintiff's recovering, were—first, that *he* was incapable of conveying on the 1st of March, because Pritchard was then the owner, and not the plaintiff; secondly, that the conveyance was invalid, by the express provisions of the Brighton Railway Act, 1 Vict. c. cxix, s. 157, as the calls due before that date were not paid; and, thirdly, that the conveyance tendered was void at common law, as there was a blank in it for the name of the transferee.

It is unnecessary for us to give any opinion except upon the last of these objections; but it may not be improper to observe, that there is great weight in the first, because the defendant has bargained for a conveyance from *the plaintiff*, which must be intended to be a conveyance in

the statutory form, and consequently, for the implied covenant of the plaintiff for title, and Pritchard's implied covenant is not the same thing.

The second objection, which would otherwise have been valid, has been waived; as it appeared on the evidence at the trial, that the defendant agreed that the plaintiff should not pay the intermediate instalments; and as the contract with respect to shares of this description, is not required by the Statute of Frauds to be in writing, since they are neither an interest in land, nor goods and merchandize (*a*), there might be a waiver by parol; and as there was such a waiver, the only objection would be to the statement of the contract in the declaration, on the ground of variance, which ought to have been made at the trial.

The last objection, however, we are all of opinion must prevail. The conveyance required by the statute must, we think, be by deed; and a deed with the name of the vendee in blank, at the time it was sealed and delivered, is void. The instrument of transfer by the 155th section must be under the *hands and seals* of both parties. It was argued that it did not follow, from the instrument being under seal, that it was a deed; for warrants of justices and subpœnas are under seal, and are no deeds. But this is an instrument containing a contract of the parties; if a contract is required to be by instrument under seal, it must be intended that it should be *by deed*, and the context shews that the legislature so intended it, for it is afterwards called a deed *or* conveyance, (probably a synonym for the same thing), and a deed of sale or transfer, that is, a *deed* of sale or of transfer. Assuming then the instrument to be a deed, it was wholly inoperative if the name of the vendee was left out, and to allow it to be afterwards filled up by an agent appointed by parol, and then delivered in the absence of the principal, as a deed, would be a violation of the prin-

(*a*) See the next case.

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ciple, that an attorney, to execute and deliver a deed for another, must himself be appointed by deed.

The only case cited in favour of the validity of a deed in blank afterwards filled in, is that of *Texira* v. *Evans* (*a*), where Lord *Mansfield* held, that a bond was valid which was given, with the name of the obligee and sum in blank, to a broker to obtain money upon it, and he borrowed a sum from the plaintiff, and then inserted his name and the sum. But this case is justly questioned by Mr. *Preston* in his edition of Sheppard's Touchstone, (68), "as it assumes there could be an attorney without deed;" and we think it cannot be considered to be law. On the other hand there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up. In Com. Dig. "Fait." (A. 1), it is said, if a deed be signed and sealed and afterwards written, it is no deed. To the same effect is Shepp. Touch. (54). In *Weeks* v. *Maillardet* (*b*) the instrument had nothing to operate upon, as it referred to a schedule as annexed, which was not annexed at the time of the execution, and it was held that the subsequent annexation, in the absence of one of the parties, did not give it operation as part of the deed. So, where a bail-bond was executed and a condition afterwards inserted, it was held bad as a bail-bond. *Powell* v. *Duff* (*c*).

The cases cited on the other side are all of them distinguishable. In one, *Hudson* v. *Revett* (*d*), a blank in a part material was filled up; but having been done in *the presence* of the party and ratified by him, it was held that there was evidence of redelivery. In another, *Doe* v. *Bingham* (*e*), the blanks filled up were in no respect mate-

(*a*) 1 Anst. 228.
(*b*) 14 East, 568.
(*c*) 3 Camp. 181; and see Bull. N. P. 267.
(*d*) 5 Bing. 372.
(*e*) 4 B. & A. 672.

rial to the operation of the deed, with respect to the party who executed before they were filled up; as to him, the deed was complete. In a third, *Matson* v. *Booth* (*a*), the point decided was, that a complete bond was not rendered void by the subsequent addition of another obligor, with the assent of all parties.

It is unnecessary to go through the other cases which were cited on the argument. It is enough to say that there is none that shews, that an instrument which, when executed, is incapable of having any operation and is no deed, can afterwards become a deed by being completed and delivered by a stranger, in the absence of the party who executed, and unauthorized by instrument under seal. In *truth, this* is an attempt to make a deed transferable and negotiable like a bill of exchange or Exchequer bill, which the law does not permit.

Rule absolute.

(*a*) 5 M. & S. 323.

COURT OF QUEEN'S BENCH.

Sittings after Michaelmas Term, 1839.

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Nov. 27th.

HUMBLE *against* MITCHELL (*a*).

Shares in a Company are not an interest in land, nor "goods, wares, and merchandize," within the 17th section of the Statute of Frauds, (29 Car. 2, c. 3 (*b*)), and therefore a contract for the sale of such shares is not required to be by note in writing, &c., as provided in cases within the said section.

Semble, There is a distinction between these words of the Statute of Frauds, and the words "goods and chattels," used in the Bankrupt Act (6 Geo. 4, c. 16, s. 72.)

ASSUMPSIT.—For refusing to transfer, in the usual manner, 100 shares in the Northern and Central Bank of England, the usual mode being for the seller to sign a notice of transfer, which notice, and the certificates of the shares, he was to produce at the bank. The defendant promised to sign the notice, and deliver the same and the certificates; but neglected to do so.

Pleas—First, non assumpsit; Secondly, that the plaintiff did not buy, nor defendant sell the said shares, *modo et formâ* &c.; Thirdly, that the said alleged contract in the said declaration mentioned, was an entire contract for the sale of goods, wares, and merchandize,

(*a*) See the judgment of *Parke*, B., in the case of *Hebblewhite* v. *M'Morine*, ante, p. 67.

(*b*) Which enacts, "that no contract for the sale of any *goods, wares, or merchandize*, for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

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for a price exceeding £10 sterling, to wit, for the price of £250; and that the plaintiff, being the supposed buyer, did not accept or actually receive, and hath not at any time accepted or actually received the said goods, wares, and merchandize in the said declaration mentioned to have been sold to him, or any part thereof; and did not give any earnest to bind the said supposed bargain in the said declaration mentioned, or in part of payment, and that no note or memorandum in writing of the said supposed bargain was made and signed by the defendant or by his agent thereunto lawfully authorized.—Verification.

The action was brought to recover £150, being the alleged loss in consequence of the non-transfer of 100 shares, alleged to have been purchased on the 8th of July, 1837, at 2*l.* 10*s.* per share, the price having risen on the 14th of August to £4 per share.

The defence was, that no bargain was completed on the 8th of July, though there was a conversation at G.'s (a share-broker) respecting 100 shares which the defendant had, and was desirous to dispose of. The effect of this conversation was, that, provided the plaintiff's offer of 2*l.* 10*s.* per share should be approved of, the defendant would send a notice of transfer to the plaintiff through G.; and he took with him from G.'s office a blank form of a notice, to be filled up, and returned if approved. G. complained of the defendant taking the sale out of his office, and the defendant, by way of compensation, put other shares (of the Leeds Bank) in his hands for sale. On the 4th of August the plaintiff tendered £250, and demanded notice of transfer.

On the trial at the Lancaster Spring Assizes, April 7th, 1838, before *Coleridge*, J., the jury found a verdict for the plaintiff, damages £100, and leave was given to the defendant to move to enter a verdict on the third issue.

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R. Alexander, in Easter Term, 1838, having obtained a rule *nisi* accordingly,

Cresswell and *Crompton* now shewed cause (*a*).—These shares do not come under the words used in the 17th section of the Statute of Frauds; and the defendant must shew, that all shares in joint-stock companies are goods, wares, or merchandize, to make that act apply to this case. We rely on the authority of the cases decided on the "order and disposition" clause of the Bankrupt Act (6 Geo. 4, c. 16, s. 72), where the words "goods and chattels" are used, which are not in the former statute. In *Hornblower* v. *Proud* (*b*), bills of exchange were held to be goods and chattels within the meaning of that 72nd section, that implies, that all personal property which can be evidenced by possession, is so. These shares are not goods, wares, or merchandize, for they cannot be handed over or delivered. *Bligh* v. *Brent* (*c*), *Bradley* v. *Holdsworth* (*d*).

R. Alexander, contrà.—The shares in question being more than £10 in value, come within the 17th section of the Statute of Frauds, and the contract for the sale should have been in writing. They are merchandize; for the Northern and Central Bank is a trading concern, and its acts have been avoided by one of the firm being a clergyman; *Hall* v. *Franklin* (*e*): and bankers, and such as deal by exchange, are properly called merchants (*g*). Similar subjects of property have been considered to come within the reputed ownership clause of the Bankrupt Act, (6 Geo. 4, c. 16, s. 72). See the cases on this subject, collected in 1 Mont. & Ayr., Bankrupt Law, p. 585, and *Ex parte Bur-*

(*a*) Before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

(*b*) 2 B. & A. 327.

(*c*) 2 You. & C. 268.

(*d*) 3 M. & W. 422.

(*e*) 3 M. & W. 259.

(*g*) Lex Mercatoria, 23.

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bridge (*a*). Shares in the Economic Assurance Company have passed to assignees as having been in the order and disposition of the bankrupt as reputed owner, *Cuming* v. *Bailey* (*b*); where *Tindal*, C. J., quotes several cases, shewing what are goods and chattels within the contemplation of the Bankrupt Act. So shares in The York Union Banking Company have been considered, *Ex parte Ord* (*c*), and there was a similar decision as to shares in the Brighton Gas Light and Coke Company, *Ex parte Vallance and Others* (*d*). If, therefore, there is any analogy between the words of the 72nd section of the Bankrupt Act, and the 17th section of the Statute of Frauds, these shares are articles of merchandize, and must be contracted for in writing.

Lord DENMAN, C. J.—The question for our consideration is, whether this contract is void by the 17th section of the Statute of Frauds; that is, whether a contract for shares in a Company, is a contract for goods, wares, or merchandize. There is no case precisely in point, though there are some which may be called in point, if we look at the mere words, as in those on the subject of reputed ownership. But, looking at the purport of the words of the 17th section, we think it is not reasonable to press more strongly than has been done, the authority of those decisions. Contracts for shares are *choses* in action, and therefore the statute does not vitiate these contracts for want of any note or memorandum in writing.

PATTESON, J.—I think there is a distinction between the words "goods and chattels" of the Bankrupt Act, and

(*a*) 1 Deac. Bankruptcy Cases, 131; *coram* the lords commissioners (on appeal from the Bankruptcy Court; *Ex parte Watkins*, 4 Deac. & Ch. 87).

(*b*) 6 Bing. 371.

(*c*) 1 Deac. B. C. 166.

(*d*) 2 Deac. B. C. 354.

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the words "goods, wares, and merchandize" of the Statute of Frauds.

WILLIAMS, J., and COLERIDGE, J., concurred.

Rule discharged (*a*).

(*a*) In *Bradley* v. *Holdsworth*, 3 M. & W. 422, it was held, that the railway shares of individual proprietors were not an interest in land, and therefore might be sold by a verbal contract; and *semble*, it would have been so, even if the act in that case had not contained a clause, by which it was declared that the shares in the undertaking, or the joint stock and fund of the Company, should, to all intents and purposes, be deemed personal estate, and be transmissible as such, and should not be of the nature of real property: and see *Bligh* v. *Brent*, 2 Y. & C. 268, and the cases cited there.

COURT OF EXCHEQUER.

Sittings after Hilary Term, 1840.

DOE d. PAYNE

against

THE BRISTOL AND EXETER RAILWAY COMPANY.

1840.
Feb. 17*th.*

EJECTMENT to recover certain land in the parish of Uphill, in the county of Somerset. The cause was tried

By the Bristol and Exeter Railway Act (6 & 7 W, 4, c. xxxvi, s. 25), it was enacted, that, if any person should, for twenty-one days after notice in writing, neglect or refuse to treat, or not agree with the Company for the sale of his estate or interest in land required by them for the purposes of the act, they might issue their warrant to the sheriff of the county to summon a jury, to assess the sum to be paid for the purchase of such lands; and that fourteen days' notice of the time and place at which such jury was summoned, should also be given to him. Section 242 provided, that the whole capital (£1,500,000) should be subscribed before any of the powers of the act, as to the compulsory taking of land, should be put in force. An inquisition taken under section 25, recited, that notice in writing had been duly given to C. H. P. by the Company, that his land was required; and that he had not within twenty-one days after such notice agreed with them for the sale thereof, and that fourteen days' notice of the time and place of holding such inquisition had also been given to him. The land being afterwards taken by the Company under the act, and an action of ejectment brought by C. H. P. for their recovery,

Held, that the inquisition set out in form sufficient to give the sheriff jurisdiction, and that the proviso of sect. 242, being in substance a defeazance of the compulsory powers of the act, need not be set out, but should come by way of answer from C. H. P.

By section 57, the lands to be taken for the *line* of the railway are not to exceed twenty-two yards in breadth, except in places required (*inter alia*) for embankments and cuttings; and section 59, (which gives the power to deviate in the *line* and *section*) limits the *deviation from the line delineated* on the plan deposited with the clerk of the peace *to* 100 *yards*, and provides that it shall not *extend into the lands* of any person not mentioned in the book of reference, unless omitted by mistake, and so certified.

Held, that the same powers were incidental to the deviated as to the original line, and that therefore the Company were not limited to 100 yards in those places in the deviation required for embankments and cuttings, but only in the actual line of the railway.

And that it was not competent to C. H. P. to object that lands of K., not mentioned in the book of reference, were taken for such purpose.

And that the line or centre, from which measurements are to be made, is the *medium filum* of the twenty-two yards of land to be taken, and not of the space between the two rails.

The 6 & 7 Will. 4, c. xxxvi, s. 47, provided that the Company, on payment of such sum as *should have been* awarded by the jury to the owner (or in case of his neglect or refusal to convey, into the Bank of England) might enter upon and take the lands. That act expired *May 9th*, 1838; but by the 1 Vict. c. xxvi, s. 1, which came into operation *June 12th*, all its powers and authorities were revived. Section 2 repealed that 47th section. Section 12 *revived* the time for taking lands and extended it to three years from the expiration of the two limited by the former act; and sect. 14 re-enacted sect. 47 in terms. An inquisition was taken under the 6 & 7 Will. 4, and an order made *June the* 11*th* for the payment of the purchase-money into the bank; and on *June the* 21*st* (C. H. P. not having offered to convey) the money was paid in accordingly.

Held, that the 1 Vict. c. xxvi, enabled the Company to act upon and to complete the proceedings of the inquisition taken under 6 & 7 Will. 4, c. xxxvi.

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before *Erskine*, J., at the Somersetshire Summer Assizes, held at Bridgewater, 1839, when it appeared that, in June, 1839, the defendants, under the compulsory powers of their act, 6 & 7 Will. 4, c. xxxvi, had entered into the land in question, of which Mr. Payne had been in possession for the last ten years, and excluded him from the occupation of it. Evidence having been given of his having refused to treat with the Company for the sale of his interest in the land, the defendants put in a warrant, signed by three directors, to the sheriff of Somerset, under section 25, commanding him to summon a jury and hold an inquisition to assess the sum of money to be paid for the purchase of the land; they also put in the inquisition itself, as follows:—

"An inquisition indented, taken pursuant to the act hereinafter mentioned, at &c., on the 27th of November, in the 1st year &c., before me, Alexander Adair, Esq., sheriff of the county aforesaid, by virtue of a certain warrant hereunto annexed, under the hands and seals of James Brown, James Gibbs, and William Morgan, being three of the directors of the Bristol and Exeter Railway Company, established and incorporated by an act of Parliament, passed &c., on the oath of Christopher George, &c., good and lawful men of my said county, qualified, according to the laws of this realm, to serve on juries in her Majesty's Courts of Record at Westminster, *notice in writing having been heretofore duly given to Charles Henry Payne, by or on behalf of the said Company*, according to *the said* act, that the lands, hereditaments, and premises hereinafter mentioned, were required by the said Company, for the purposes of the said act, and the said C. H. P., not having, within the space of twenty-one days and more after the giving of such notice, agreed with the said Company for the sale, conveyance, or release of the said lands, hereditaments, and premises, or of his estate and interest therein; and notice in writing of the time and place at which the jury were required to be returned,

having been duly given fourteen days and more before the said 27th day of November: which said C. George, &c., being sworn to inquire of and concerning the matters mentioned in the said warrant, and thereby directed to be inquired of, assessed, and ascertained by them in manner therein mentioned; and the said Company, by their counsel, having, at the time and place aforesaid, appeared before me and the said jurors, and having adduced evidence before me and the said jurors touching the matters in question; and the said C. H. P., in the said warrant named, having also appeared, but having declined to adduce any evidence, or otherwise to take part in the proceedings, then and there had before me and the said jurors: the said jurors on their oath aforesaid say, that they do assess and give a verdict for the sum of 98*l.* 10*s.*, to be paid to the said C. H. P., for the purchase of the estate, right, title, and interest of the said C. H. P., of and in certain arable and pasture ground, portions of certain lands and premises, containing in the whole by admeasurement one acre, one rood, twelve perches, little more or less, being parts of three certain pieces or parcels of land, situate and being in the parish of Uphill, in the said county of Somerset, distinguished in the map or plan, and book of reference, deposited in the office of the clerk of the peace of the said county, and referred to by the said act, by the numbers 15, 34, and 39, as regards lands in the said parish of Uphill; and of all clay, stone, mines, and minerals under the same, necessary to be dug, or carried away, or used for the purposes of the said act, and found not deeper than the line of the section, in the said act mentioned and referred to, and in the same warrant mentioned, about to be taken and used in execution of certain of the powers granted by the said act: and the said jurors do in like manner assess and give a verdict for the further sum of 58*l.*, to be paid to the said C. H. P., by the said Company, as well by way of satisfaction, recompense, or compensa-

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tion, for the damages which have, before the said 27th day of November, been done to or sustained by the said C. H. P., by reason of the execution of any of the works by the said act authorized, as for the damage to be by the said C. H. Payne, sustained by reason of the severing or dividing the lands aforesaid; and I the said sheriff do hereby, pursuant to the said act, adjudge and order the several sums of 98*l.* 10*s.*, and 58*l.*, making together the sum of 156*l.* 10*s.*, to be paid by the said Company to the said C. H. P. In witness, &c.

The defendants then proved the payment into the Bank of England, on the 21st of June, of the 156*l.* 10*s.* so awarded by the jury; to be placed to the account of the Accountant-General of the Exchequer, to the credit of Payne, under an order, dated June 12th, as required by section 42. Several engineers were then called, who proved that in the language of scientific men, the *centre* of the railway is the centre between the rails, and it was admitted that the centre as so defined, did not deviate one hundred yards from the line delineated in the map, deposited with the clerk of the peace, but that the eastern extremity of the slope of the present railway was 125 yards from that line; that the portion of land in question which was more than 100 yards from the line, was taken for the purpose of making the slope of an embankment, and that the Company in so doing, had taken part of a field called Tynings, belonging to a Mr. Knyfton, which was not mentioned in the plan or book of reference deposited with the clerk of the peace.

It was objected, on the part of the plaintiff,—1st. That the inquisition was void for not setting out that the whole sum had been subscribed; as a preliminary proceeding, required by section 242, to enable the Company to put in force the compulsory powers of the act for taking land; 2ndly. That the Company had no right to take the land in question, it being more than 100 yards from the

delineated line of the railway (sect. 59); 3rdly. That the proceedings were void in consequence of the Company having gone through the field called Tynings, which was not mentioned in the plan or book of reference; and 4thly. That the powers of the Company to take such lands, by section 257 ceased at the expiration of two years from the passing of the act (viz. the 19th of May, 1838), and that, although the 1 Vict. c. xxvi, (which received the Royal Assent, June 11th, 1838), extended the powers of the former act to things to be done under that act, as if re-enacted, yet that no inquisition under the old act could be the foundation of a compulsory payment under the new, or that, if it could, the provisions of the new act had not been complied with; for that the 14th section only enabled the Company to pay the purchase-money into the Bank of England, on the neglect, refusal, or inability of the owner of the land to make a good title; and that it could not be said, that, between the 11th of June, when the act passed, and the 12th, when the order for paying in the purchase-money was made, there could be any such neglect or refusal. The learned Judge directed the jury to find for the defendants, giving leave to the plaintiff to move to enter a verdict on all these points, and *Erle*, in Michaelmas Term, 1839, having obtained a rule *nisi* accordingly (*a*).

(*a*) The sections of the statute referred to in the arguments on this and the next case were as follows:—

Sect. 6 & 7 Will. 4, c. xxxvi, s. 5, empowers the Company to "make and maintain the railway and branch railways thereinafter mentioned, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, or over the lands delineated on the plan, and described in the books of reference, deposited with the respective clerks of the peace for the counties of Somerset and Devon, and for the cities and counties of the cities of Bristol and Exeter, save as hereinafter mentioned, that is to say," &c.

Sect. 6, (reciting, that, whereas maps or plans and sections, describing the line of the said railway, and the lands upon or through which the said railway is intended to be carried or made, together with books of reference thereto, containing lists of the names of the

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Butt and *M. Smith* (with whom was *Bompas*, Serjt.) now shewed cause (*a*).—First, This inquisition is good: it recites

(*a*) Before *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

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owners or reputed owners and occupiers of such lands, have been deposited with the clerks of the peace for the counties of Somerset and Devon, and for the city and county of the city of Bristol, and the city and county of the city of Exeter); enacts, "That the said maps or plans, sections, and books of reference so deposited, shall remain with and be kept by the said clerks of the peace respectively; and all persons interested in any manner in such lands, shall have liberty at all reasonable times to inspect, and to make extracts from, or copies of the said maps or plans, sections, and books of reference respectively, paying to the clerk of the peace, in whose custody the map or plan, section, or book of reference, so inspected or referred to, may be, for every inspection, the sum of one shilling, and for copies of or extracts from the said books of reference, after the rate of sixpence for every one hundred words; and the said maps or plans, sections, and books of reference, or true copies thereof, or of so much thereof respectively, as shall relate to any matter which may be in question, certified by the said clerks of the peace, or one of them, shall be and are hereby declared to be *good evidence in all courts of law or elsewhere*."

Sect. 7, provides "That it shall be lawful for the Company to make the said railway and other works, in the line or course, and upon, across, under, or over the lands delineated on the said maps or plans; although such lands or any of them, or the situation thereof respectively, or the names of the owners or occupiers thereof respectively, may happen to be omitted, mis-stated, or erroneously described in the said books of reference, or in the schedule to this act annexed; if it shall appear to any two or more justices of the peace for the county, city, or place wherein the matter in question shall arise (in case of dispute about the same), and be certified by writing under their hands, that such omission, mis-statement, or erroneous description proceeded from mistake; and the certificate of the said justices shall be deposited with and remain in the custody of the respective clerks of the peace of the said counties and cities, as the case may require."

Sect. 8 enacts, "That, for the purposes, and subject to the provisions and restrictions of this act, the said Company, their agents and workmen, and all other persons by them authorized, are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same or of any part thereof, and to set out and appropriate for the purposes of this act, such parts thereof as they are by this act empowered to take or

every thing to have been done which is necessary to give jurisdiction. All that the jury are required to do by section 25

use, and in or upon such lands, to bore, dig, cut, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the said railway, and other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of this act; and also for the purposes, and according to the provisions and restrictions of this act, to make or construct in, upon, across, under, or over the said railway or other works, or in, upon, across, under, or over any lands, streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, *embankments*, aqueducts, bridges (whether temporary or permanent), roads, ways, passages, conduits, drains, piers, arches, *cuttings*, and fences, and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engines, and other buildings, machinery, apparatus, and other works and conveniences as the said Company shall think proper; and also to alter the course of any rivers, canals, brooks, streams, or water-courses, as may be necessary for constructing and maintaining tunnels, bridges (whether temporary or permanent), or passages over or under the same; and also to divert or alter the course of any rivers or streams of water, roads or ways, or to raise or sink any such rivers or streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the said railway, and to make drains or conduits into, through, or under any lands adjoining the said railway for the purpose of conveying water from or to the said railway; and also from time to time to alter, repair, or discontinue the before-mentioned works or any of them, and to substitute others in their stead, and to do and execute all other matters and things necessary or convenient for making, maintaining, altering, or repairing and using the said railway and other works by this act authorized; they, the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said Company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained in or by reason of the execution of all or any of the powers hereby granted; and this act shall be sufficient to indemnify the said Company and all other persons for what they or any of them shall do by

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is "to inquire of, assess, and give a verdict," and the only evidence for their consideration is as to the value of the

virtue of the powers hereby granted, subject nevertheless to such provisions and restrictions as are hereinafter mentioned and contained."

Section 25. 'For settling all differences which may arise between the said Company and the several owners and occupiers of, or persons interested in any lands, which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted;' enacts, "That, if any person, corporation, or trustee so interested or entitled and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said Company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid, or if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept such purchase-money &c. as aforesaid, as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within twenty-one days next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, or if any of such parties as aforesaid shall, for the space of twenty-one days next after notice in writing shall have been given to the clerk, agent, or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any lands required for the purposes of this act, *neglect or refuse to treat, or shall not agree with the said Company for the sale, conveyance, and release of their respective estates and interests*, or the respective estates and interests which they respectively are hereby capacitated to convey therein, or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance, or release, as shall be necessary or expedient for enabling the said Company to take such lands, or to proceed in making the said railway and other the works aforesaid, or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest, or charge which they may claim to be entitled unto, or interested in, in case they shall be required to do so by the said Company, or in any other case where an agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made, then in every such case the said Company shall, and they are hereby required, from time to time to issue a warrant, either under their com-

land; and the judgment carries it no further, it is binding *and conclusive* as to the sum to be given, but does not

mon seal, or under the hands and seals of three at least of the directors of the said Company, to the sheriff of the county in which the lands in question shall be situate, or the matter in dispute shall arise, or in case such sheriff or his under-sheriff shall be one of the said Company, or enjoy any office of trust or profit under them, or shall be in any way interested in the matter in question, then to any of the coroners of such county not interested as aforesaid, or if all the coroners shall be so interested, then to some person then living in the county and free from personal disability, who shall have filled the office of sheriff or coroner in the said county, and not be interested as aforesaid (a person having more recently served either office being always preferred), commanding such sheriff or coroner or other person to impanel, summon, and return, and the said sheriff, coroner, or other person is hereby accordingly empowered and required to impanel, summon, and return, a jury of at least twenty-four sufficient and indifferent men, qualified according to the laws of this realm, to be returned for trials of issues in his Majesty's Courts of record at Westminster; and the persons so to be impanelled, summoned, and returned, are hereby required to appear before the said sheriff, under-sheriff, coroner, or other person, at such time and place as in such warrant shall be appointed, and to attend from day to day until duly discharged; and out of such persons so to be impanelled, summoned, and returned, a jury of twelve men shall be drawn by the said sheriff, under-sheriff, coroner, or other person, or by some person to be by them respectively appointed, in such manner as juries for trials of issues joined in his Majesty's Courts of record are by law directed to be drawn; and in case a sufficient number of jurymen shall not appear at the time and place so to be appointed as aforesaid, such sheriff, under-sheriff, coroner, or other person, shall return other honest and indifferent men of the standers-by, or of others that can speedily be procured to attend that service, (being so qualified as aforesaid,) to make up the said jury to the number of twelve; and all parties concerned may have their lawful challenges against any of the said jurymen, but shall not challenge the array; and the said sheriff, under-sheriff, coroner, or other person, is hereby empowered and required, on request in writing by either party, to summon before him all persons who shall be thought necessary to be examined as witnesses touching the matters in question, and may authorize or order the said jury, or any six or more of them, to view the place or matter in controversy; and such jury shall upon their oaths, or, being quakers, upon their affirmations, (which oaths and affirmations, as well as the oaths and affirmations of all such persons as shall be called

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change the property or right of possession. It is not like an order which directly gives the right to take the land; it

upon to give evidence, the said sheriff, under-sheriff, coroner, or other person, is hereby empowered and required to administer,) inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said Company from any other person, and also the sum of money to be paid by way of satisfaction, recompense, or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for the future, temporary, or perpetual, or for any recurring damages to be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed, or repaired by the said Company, and which cannot or will not be further obviated, removed, or repaired by them; which satisfaction, recompense, or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid, and the said sheriff, under-sheriff, coroner, or other person shall accordingly give judgment for such purchase-money, satisfaction, recompense, or compensation as shall be assessed by such jury; which said verdict and the judgment thereon to be pronounced as aforesaid shall be binding and conclusive, to all intents and purposes, upon all persons and corporations whatsoever; provided always, that in such inquiry the person or corporation claiming compensation shall be plaintiff, and shall have all such rights and privileges as plaintiffs in actions at law are entitled to; provided also, that no less than fourteen days' notice in writing of the time and place at which such jury are so required to be returned shall be given by the said Company to the party with whom any such controversy shall arise, either by delivering such notice to such party, or by leaving the same at his place of abode, or with the clerk or agent, or principal officer of the corporation, in the case of a corporation, or with some tenant or occupier of the premises intended to be valued, or respecting which or any damage to which any such question shall arise; provided always, that, where any difference shall arise between the said Company and the owner and occupier of, or any person interested in any *mansion-house*, park, or pleasure-ground, which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted, then and in every such case the said Company shall, and they are hereby required to issue such warrant to the said sheriff, coroner, or other person, commanding him, and he is hereby accordingly empowered and required to impanel, summon, and return a jury *consisting of such persons as are usually summoned to serve on special juries* at the as-

is only one step towards it, but as a step it is perfect. What is there to make it necessary to state in the inquisi-

sizes of the said county in which such last-mentioned difference shall arise."

Sect. 27, enacts, "That the said verdicts and judgments being first signed by the said sheriff, under-sheriff, coroner, or other person presiding at the taking of such verdict and pronouncing of such judgment respectively, shall be kept by the clerk of the peace for the county in which the matter of dispute shall have arisen, among the records of the Quarter sessions of such county, and shall be deemed *records to all intents and purposes*, and the same or true copies thereof shall be allowed to be *good evidence* in all Courts whatsoever (*a*)."

Sect. 42, enacts, "That in case any party to whom any money shall be agreed or awarded to be paid for the purchase of any lands to be taken or used under or by virtue of the powers of this act, or for any interest, or for compensation as aforesaid, shall refuse or neglect to accept the same, or to convey the premises or interest in the premises purchased, or shall refuse, neglect, or be unable to make a title to such premises, or to such interest in the premises, to the satisfaction of the said Company, or shall be absent from England or shall not be conveniently found, or if any party entitled unto or to convey such lands, or such interest therein cannot be conveniently known or discovered, or be not shewn to the satisfaction of the said Company to be such party, then, and in every such case it shall be lawful for the said Company to order the money so agreed or awarded as aforesaid to be paid into the Bank of England in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account to the credit of the parties interested in the said lands (describing them, so far as the said Company can do), subject to the control and disposition of the said Court; which said Court, on the application of any party making claim to such money or to any part thereof by petition, is hereby empowered in a summary way of proceeding or otherwise, to order the same to be laid out and invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, according to the estate, title, or interest of the party making claim thereunto, and to make such other order in the premises as to the said Court shall seem proper, and the cashier of the Bank of England, who shall receive such money, is hereby required to give to the said Company a receipt for such money, mentioning and specifying therein for what and for whose use (described as aforesaid) the same is received."

(*a*) See the case of *Regina* v. *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company*, ante, Vol. 1, p. 545.

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tion that the preliminary sum required by section 242 has been subscribed? The sheriff is not obliged to make a

Sect. 47, enacts, "That, upon payment or legal tender of such sums of money as shall have been agreed upon between the parties, or awarded by a jury in manner aforesaid, for the purchase of any lands, rent, or other charge, or as a compensation for any loss or injury as aforesaid, to the respective proprietors of such lands, or other persons respectively interested therein and entitled to receive such money or compensation respectively, within three calendar months after the same shall have been so agreed upon or awarded, or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse or be unable from illness to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands (to the satisfaction of the said Company), or if any party entitled unto or to convey such lands shall not be known, or shall die after such agreement or award, or shall be absent from England, or shall refuse, neglect, or be unable from illness or otherwise to convey the same, then upon payment of such money into the Bank of England as hereinbefore directed to the credit of the parties interested in such lands, or in case such money shall have been agreed or awarded to be paid for the purchase of any such lands or compensation as aforesaid, which any corporation, trustee, or person under disability, is hereby capacitated to convey, upon payment of such money into the Bank of England, as hereinbefore directed to an account *ex parte* "The Bristol and Exeter Railway Company," then and in every of such cases it shall be lawful for the said Company immediately to enter upon such lands, and thereupon such lands, and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of all parties therein, shall thenceforth be vested in and become the sole property of the said Company to and for the purposes of this act; and such payment, or tender and conveyance, or such deposit in the Bank of England as aforesaid, shall operate to merge all outstanding or other terms of years, and to bar and destroy all dower and all estates tail, and other estates in reversion and remainder, and all rights, titles, limitations, and trusts whatsoever of and in the said lands: provided nevertheless, that before such payment, tender, or deposit in the Bank of England as aforesaid, it shall not be lawful for the said Company, or any person acting under their authority, to bore under, dig, or cut into or enter upon such lands for any of the purposes of this act, save for the purposes of ascertaining and setting out the same for the purposes of this act, without the previous consent of the owners and occupiers thereof respectively; provided always, that it shall not be lawful for the said

perfect order; how is he to know these matters, or to *adjudicate* upon the rights of parties? [*Parke*, B.—The Company to make such entry after demand made of such purchase-money or compensation by the party entitled thereto, and default made by the said Company in payment thereof for the space of twenty days after such demand, unless such payment shall be delayed by acts, neglect, or default of the party entitled thereto."

Sect. 57, enacts, "That the lands to be taken for *the line* of the said railway shall not exceed twenty-two yards in breadth, except in those places where a greater breadth shall be judged necessary for carriages to wait, load, or unload, and to turn or pass each other, or for raising *embankments* for crossing vallies, or low grounds, or for *cuttings*, or for the erection and establishment of any fixed or permanent machinery, toll-houses, warehouses, wharfs, or other erections and buildings, and except at or near the terminations of the said railway and the branches thereof, in the respective parishes of Temple otherwise Holy Cross in the city and county of the city of Bristol, Bridgwater in the county of Somerset, and Tiverton and St. Thomas in the county of Devon, and except also on commons, downs, or waste grounds, unless with the previous consent in writing of the owners or occupiers of any lands which the said Company shall be desirous of appropriating to the obtaining greater space for the purposes hereinbefore mentioned."

Sect. 59, enacts, "That no deviation from the line laid down on the plan so altered and authenticated as aforesaid, shall extend beyond a certain distance, (between certain points therein specified), without the previous consent in writing of the owners and occupiers respectively of the lands adjoining the said railway, and that the said Company, in making the said railway and other works by this act authorized, *shall not deviate from the line delineated* on the maps or plans so deposited with the clerks of the peace as hereinbefore mentioned, with or without the consent of the owners or occupiers of the lands or any of them, to a greater distance than 100 yards, nor in passing through any city or town to a greater distance than 10 yards from the line so delineated upon the said plans, nor shall any deviation to be made by the said Company, *extend into the lands or property of any person whose name is not mentioned in the said book of reference*, unless the name of such person shall have been omitted by mistake, and unless the fact that such omission proceeded from mistake shall have been certified, in manner hereinbefore provided for in cases of unintentional errors in the said book of reference: provided always, that the said Company shall have power to deviate to the extent hereinbefore mentioned, and to make such deviation *in the section* as may be necessary in consequence thereof."

Section 235, enacts, "that no

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question is, whether we are to take notice of something required by a subsequent section, in an inquisition on a

proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form, or be removed by *certiorari*, or by any other writ or proceeding whatsoever, into any of his Majesty's Courts of record at Westminster or elsewhere, any law or statute to the contrary notwithstanding."

Sect. 242, reciting that 'Whereas the probable expense of making the said railway and the other works hereby authorized, will amount to the sum of £1,500,000, and the sum of £750,000 and upwards, or one-half thereof, has been already subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for;' enacts, "That *the whole of the said sum of* £1,500,000 *shall be subscribed for* in like manner, before any of the powers given by this act in relation to the *compulsory taking* of land for the purposes of the said railway shall be put in force."

Sect. 243, provides, "That a certificate under the hand and seal of any justice of the peace for either of the respective counties of Somerset and Devon, or for the cities and counties of the cities of Bristol or Exeter, that the whole of the said sum of £1,500,000 hath been subscribed as aforesaid, (and which certificate such justice is hereby authorized and required to grant, on application made to him by the said Company, and on production of the subscription deed of or relating to the said Company,) shall for all purposes whatsoever be conclusive evidence that the whole of the said sum of £1,500,000 has been subscribed."

Sect. 257 enacts, "That, unless the said Company shall within the space of two years, to be computed from the passing of this act, agree for, or cause to be valued and paid for, as in this act is mentioned, the lands which they are by this act empowered to take or use, or otherwise so much thereof as shall be by them deemed necessary and proper for the purposes of making the said railway or other works hereby authorized, (save and except &c.) then and from thenceforth the powers which are hereby granted to them for taking or using such lands shall cease and be utterly void (save and except with the consent in writing of the owners and occupiers thereof respectively)."

By 1 Vict. c. xxvi. s. 1, "All the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, matters, and things contained in the said recited act 6 & 7 Will. 4, c. xxxvi., (except such of them or such parts thereof respectively as are by this act repealed, altered, or otherwise provided for,) shall extend and be construed to extend to this act, and to the several works and things hereby

previous one; whether the deficiency of the sum subscribed *should* not come as an answer on the other side, according to *Rex* v. *Theed* (*a*).] At all events the omission is merely of matter of form, for which, by section 235, these proceedings are not to be vacated.

As to the cases relied upon by the other side, *R.* v. *Bagshaw* (*b*) was an order for taking land where no notice had been given to the proprietor; consequently the magistrate, who could only make such order *on notice to the party*, had no jurisdiction: the objection there did not appear on the face of the inquisition, but the proceedings, and that

authorized or required to be made and done, and shall operate and be in force in respect to the purposes and objects of this act, and of the said recited act as altered and amended by this act, as fully and effectually, to all intents and purposes whatsoever, as if the same powers &c. were repeated and re-enacted in this act."

Section 2, (recites and repeals so much of the 47th section of the former act as is above set out).

Section 12, enacts, "That the time by the said recited act limited for the taking or using of lands for the purpose of the said undertaking thereby authorized, shall be and the same is hereby revived, and extended and enlarged for the further term of three years, to be computed from the expiration of the time in such act mentioned."

Section 14. "That, upon payment or legal tender of such sums of money *as shall have been* agreed upon between the parties, or awarded by a jury, in manner in the said recited act mentioned, for the purchase of any lands, &c., or if the parties so respectively interested and entitled as aforesaid cannot be found, or shall be absent from England, or shall refuse or be unable from any cause whatever to receive such money as aforesaid, or shall refuse, neglect, or be unable to make a good title to such lands to the satisfaction of the said Company, &c., or to convey the same, then upon payment of such money into the Bank of England as in the said recited act directed, &c., it shall be lawful for the said Company immediately to enter upon such lands, and thereupon &c., (as in section 47 of the recited act); provided always, that, before such payment, tender, or deposit in the Bank of England as aforesaid, it shall not be lawful for the said Company &c. to enter &c. upon such lands for any of the purposes of this or the said recited act, without the previous consent of the owners and occupiers thereof respectively," &c.

(*a*) 2 Lord Raym. 1375; 1 Strange, 608.

(*b*) 7 T. R. 363.

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disposes of *Rex* v. *The Mayor of Liverpool* (*a*), where a notice was required that parties might appear to see their interests properly protected, and no such notice had been given. *Rex* v. *The Trustees of Norwich and Watton Road* (*b*) was a case where an order was held bad for not apportioning the value, and appeared to be defective for not setting out that the parties had been served with notice to treat: on that point, however, there was no decision; and if there had been, this case is clear of it, for the inquisition recites that notice was given, and that it was not complied with. So, in the case of *Regina* v. *The Committee Men for the South Holland Drainage* (*c*). The objection that existed in *Regina* v. *The Trustees of Swansea Harbour* (*d*) does not appear here, and in that case *Littledale*, J., held, that the statute requiring no regular form of an inquisition, it is not necessary to draw it up with the formality required in setting out the judgment of an inferior court, which tends rather to shew that such matters need not be set out on the face of the inquisition, not being necessary to give the sheriff jurisdiction, as they bind no right, and give no title. [*Parke*, B.—The sheriff is to give judgment, therefore every thing necessary to give him jurisdiction should appear on the face of the inquisition.] It is so in this case.

Secondly, as to the question of *deviation*, which depends on the construction of sections 57 and 59. Section 57 provides, that the railway shall not exceed twenty-two yards in breadth, except in places required for embankments, &c. And section 59 authorizes a deviation of one hundred yards by the side of the line, that is, they are merely to substitute the deviated line for the original, and whatever power was given as incidental to the one is so to the other. The *line* of railway means the whole space of

(*a*) 4 Burr. 2244.
(*b*) 5 Ad. & Ell. 563.
(*c*) 8 Ad. & Ell. 429.
(*d*) Id. 439.

ground taken for the purposes of the railroad or embankments, and the limit being by the side of the railway from one extremity to the other, measuring from centre to centre, from right side to right side, or from left to left, this deviation is within the prescribed limits. [*Alderson*, B.—Do you measure according to the surface of the ground or the base?] Section 59 gives power to alter the sections according to the deviations; that shews that a base, and not a mere surface measurement, was contemplated, to provide for embankments and cuttings.

Thirdly, it is objected that the Company have taken land not scheduled; that is, that at the west corner they touch with their cuttings. [*Parke*, B.—If the owner consents, what has the rest of the world to do with it? the 59th section only means you shall not take compulsorily.]

Fourthly, it is said, that the powers of the first act (6 & 7 Will. 4) had ceased when this land was taken, and were not properly revived. The 1st and 12th sections of the second act extend the powers of the former, with respect to the time limited; then section 14 makes it lawful for the Company to enter lands upon payment of the money into the Bank of England, and nothing but such payment is contemplated. These sections revive the old act, and the extended time is to be dated from the period before allowed.

Erle, *Crowder*, and *Fitzherbert*, contrà.—First, as to the inquisition. The intention is, that, though mentioned in a subsequent clause, it must shew jurisdiction, which is not, as is argued by the other side, to be presumed unless rebutted, and the proviso over-rides the whole act. [*Parke*, B.—A proviso need not be noticed in a conviction, and the clause here is in the shape of a proviso, it ought to be shewn by way of answer that the party comes within such exception. *Rex* v. *Hall* (*a*).]

(*a*) 1 T. R. 320.

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Secondly, as to *deviation*, the question is, whether the provisions as to the original line apply to the deviated one. Hitherto every person has supposed he would have notice of his lands being required, by their being inserted in the schedule; but, by the construction the Court is now asked to put, it may well happen, that, by deviating ninety-nine yards, you may cut into lands distant considerably more than one hundred, for that you may take any distance for cuttings if you commence within the one hundred. [*Parke*, B.—The act gives no *compulsory* powers, except in the case of lands scheduled.] It is admitted that as far as the line of railway goes the name must be mentioned, the protection to the party arises from the close being named in the schedule. Section 57 speaks of lands to be taken for the *line* of the railway,—that clearly means for cuttings, &c., as well as for the railway itself; twenty-two yards are laid down as the line of this parliamentary railway, with certain accessories, that is, subject to certain exceptions, and it is contended that as to them there is unlimited discretion. If so, the most formidable powers are given. The word *centre* does not occur in the act, but there must be two defined, to measure from centre to centre; one is agreed upon, that one is the middle of the parliamentary line, and may be taken as the *terminus a quo*. [*Alderson*, B.—I take that to be the centre of the land taken.] No: the centre, (as defined by the engineers), between the two rails. Then the proper construction is to treat the deviated line as always on a dead level, and that no discretionary additions apply to it; it must be measured distinctly one hundred yards from the corresponding limit, and if any of the additions are intended, they must be kept within that distance. This is evident from the language of the 57th and 59th sections. These clauses were intended for the protection of landowners, and ought to be so construed; otherwise, if a man has a field A., within the one hundred yards, and also 1 nd half a mile off, according

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to the construction on the other side, the Company may make the line through A., and take the other land for the cuttings. This inconvenience is still more apparent in the case of a town, where, instead of the ten yards allowed by section 59, twenty or thirty might be required for the cuttings, &c. It might even be construed to include other works, such as toll-houses; and if allowed, there would be a way of converting a trespass into a lawful act.

The third objection, as to the effect of passing through the land of Mr. Knyfton, comes under the same principle as the question of deviation. If that which is taken for cuttings is part of the *railway*, then they have gone into his land; if cuttings are not a part of the railway, that clause does not apply, and he must seek his remedy by action of trespass.

Lastly, as to the vacuum, occasioned by the first act expiring in May and the second beginning in June; during that time all the compulsory powers were gone, and something remained to be done to complete the inquisition under section 47. The powers of the previous act were at an end, and the latter is to be looked at as if all the former powers were re-enacted; that does not assist the Company, it only means, if they want another inquisition, they must look at the old act. Section 14 enables them to do what section 47 did, pay money into the Bank; but it has no retrospective operation, and does not revive it. The effect of repealing a statute is to obliterate it as completely from the records of Parliament, as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and *concluded* whilst it was an existing law, (*per Tindal*, C. J., in *Ray* v. *Goodwin* (*a*); and see the remarks of Lord *Tenterden*, C. J., in *Surtees*

(*a*) 6 Bing. 582.

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v. *Ellison* (*a*); and of *Bayley*, J., in *Palmer* v. *Moore* (*b*). Then, looking at the repealing section, it is quite clear, that, up to June 11th, the inquisition being only in transition, was nugatory: then comes section 14, relating to the refusal of a party to make title, which is a refusal subsequent to making the order which is the foundation of the payment; that order was given June the 12th, so that there was no time for such neglect or refusal.

PARKE, B.—This rule must be discharged. One question in this case is, whether the inquisition was sufficient: upon that it must be admitted, that, as there is to be extraordinary jurisdiction exercised by the sheriff, every preliminary required by the act to give it, should be set out on the face of the inquisition. The question is, whether this has been done here. It seems to me that it has. All that is required by the 25th section has been set out; and the only question is, whether what is made necessary by section 242, ought also to have been stated. That section is, in substance, a defeasance of the compulsory clauses of the act; and, being so, need not be set out on the face of the inquisition, but ought to come by way of answer from the other side. In the case of *Rex* v. *Theed* (*c*), Lord *Raymond's* judgment went on the ground of the word "lawfully" being introduced; but it is well settled that a proviso or defeasance need not be set out in a conviction, but should come as a defence, and that Mr. Payne, to avail himself of it, ought himself to have shewn that the £1,500,000 had not been subscribed.

The next question is as to the deviation, and is very important. It appeared in evidence, that the new line was within one hundred yards of the original parliamentary line, but that the cuttings considerably exceeded that

(*a*) 9 B. & C. 752.
(*b*) Id. 754, n. (*a*).
(*c*) 2 Lord Raym. 1375; 1 Str. 608.

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distance; and it appears to me that the Company were clearly authorized to do this. To decide this question, we must look to the sections of the act giving these powers. [His Lordship read the 5th section.] If the act had stood there with no permission or restriction, they would have been bound to make the railroad, as therein provided, of a convenient and reasonable width. Then the 57th section gives the width, twenty-two yards, with an additional width in some places, for roads, cuttings, &c.; and I take it, in applying the parliamentary line to the ground, they must take the centre of the twenty-two yards; and having fixed that, might make a railroad of that width on the level, with additional spaces for cuttings, embankments, toll-houses, &c., as occasion might require. Then comes section 59, on which this question turns; the true construction of which is, that the Company may make the railroad in a new line, which new line shall be laid down on the plane within one hundred yards of the old one; otherwise, I think great inconvenience would ensue. When you come to apply the new line to the old, you lay down on the ground a thin string, and exactly in the line originally delineated, which I take to be the centre of the twenty-two yards, then, taking that as a point, you may lay down a new string one hundred yards from the old, and make the substituted railroad there, for which you may have all the accompaniments of the old line, as if the new one had been inserted in the parliamentary plan; and the measurement for that new line must be horizontal.

It has been said, that this would be a hardship on the landowners, who are not aware of the existence of such powers. But the landowners are bound to construe the act according to its true meaning. It has been said also, that it would be a hardship on persons whose names are not in the book of reference, as slopes and other works might be made in places not specified in the book. But

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that by no means follows from my proposition; for it would be incompetent to them to trespass on lands of such persons without their consent, as they are limited to the former powers, and cannot go out of the lands specified for their works and conveniences. If any other construction were to be put upon the act, it would make it liable to great uncertainty and inconvenience; for nobody can tell with certainty what slopes might be required, as that would depend entirely upon the nature of the strata. The principal objection therefore is, in my opinion, disposed of.

The third point is, that the railroad is made over lands of a Mr. Knyfton, which is not mentioned in the plan or book of reference. That appears to me to be no objection. The 59th section provides that "no deviation shall extend into the lands or property of any person whose name is not mentioned in the said book of reference," and if this new line trespassed on Mr. Knyfton's land, it would not be allowed by the act. I have some doubt whether, even with his consent, they could make a *line* of railroad, when it is not so delineated; but the *line* keeps clear of this, and it is only the necessary slopes which extend into his land, and any complaint on that score is a question entirely for him.

Lastly, it is objected that this inquisition was taken under the old act, which expired May 19th, 1838, in consequence of the operation of section 257. In this case the inquisition was held within the two years limited by that section, but the money was paid into the Bank of England after the expiration of them; from that time they would no doubt have been trespassers under the old act, unless it is revived by the new. By the 14th section power is given to the Company to act upon the old inquisition of the jury, and to complete anything not before done. The words are, "upon payment of such sums of money as," (not *shall be,* but) "*shall have been* agreed upon or awarded

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by a jury, in manner in the said-recited act mentioned, for the purchase of any lands," &c. It seems to me, that this enables them to act on the old inquisition; but that they could not pay the money into the Bank of England, under this section, unless there were a neglect or refusal to make title.

It then becomes a short question of fact, whether there was such neglect or inability in Mr. Payne to make a good title. The facts are, that this act came into operation on the 11th of June; on the 12th an order was made by the Court of Exchequer to pay in the money, and on the 21st it was paid in accordingly. The question, then, is, whether there was reasonable evidence for the jury, to shew neglect to make out his title between the 11th and 21st of June, (not the 11th and 12th, for this order was obtained by the Company provisionally). There can be no doubt there was such neglect. It is evident that Mr. Payne meant to keep the Company at arm's length; so that they were justified in paying the money into Court. I think, therefore, the defendants are entitled to succeed on all the objections, and that this rule must be discharged.

ALDERSON, B.—I am of the same opinion. The question of deviation, which seems to be the principal point, appears to me to be a very simple proposition. In the parliamentary plan a line is laid down, and a certain deviation from it is permitted. That parliamentary line is to be the guide for persons to go across the country, and represents the *medium filum* of the future railway, and the deviation to be allowed is to be calculated by the distance between the two points, which are the *media fila* of the parliamentary and the substituted lines; if that distance does not exceed 100 yards horizontally, it does not exceed the deviation allowed by the act of Parliament. If that be so, according to the evidence the deviation here does not exceed that limit.

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But it is said that the word "deviation" cannot have that sense, that is, it cannot mean the interval between the two *media fila*, because, by section 59, "the deviation shall not extend into lands not mentioned in the book of reference." I entirely agree that it cannot: this being a parliamentary bargain between the parties, must be accurately performed, as other persons besides the owners of the land may have an interest in the railway not so deviating. But it appears to me, that although we ought to put that rigid construction on the actual *line* of railway, it does not extend to the slopes; for when the railway itself is only allowed to go to a certain distance from the original, it cannot be very important for individuals upon the residue of the line, to consider whether the Company have taken the lands of other persons for their embankments, &c.; if it is done with their consent, and it cannot without, it becomes a matter of indifference.

I wish it to be distinctly understood that by the line to be taken for these measurements, I mean the middle of the twenty-two yards which the Company are entitled to take, and not the *medium filum viæ* between the two rails.

The last objection is completely removed by the very careful wording of the second act, into which provisions have evidently been introduced for the express purpose of carrying into full effect previous proceedings under the inquisitions. Then, how could the jury have failed to find either neglect or inability, not only to complete, but to complete to the satisfaction of the Company? As to the omission of the allegation of the sum subscribed, that is a case of proviso, and is immaterial.

GURNEY, and ROLFE, Bs., concurred.

Rule discharged (*a*).

(*a*) See the next case.

COURT OF QUEEN'S BENCH.

In Easter Term, 1838.

THE QUEEN

against

THE BRISTOL AND EXETER RAILWAY COMPANY.

1838.
May 9th.

IN Hilary Term, 1838, Sir *J. Campbell*, Attorney-General, obtained a rule *nisi* for removing into this Court by *certiorari* an inquisition of the value of certain lands in the county of Somerset, in order that the same might be quashed (*a*).

It appeared from the affidavits, that Mr. Payne was the owner of a freehold estate in the parish of Uphill, consisting of a mansion-house standing on a lawn, and divers closes of land, and that the line of the intended railway, as delineated and laid down in the plans and books of reference referred to in the act of Parliament, deposited with

By the Bristol and Exeter Railway Act (6 Will. 4, c. xxxvi. ss. 5 & 7), it was provided, "that the Company should make the railway and other works, by the said act authorized, on or through the lands delineated on the maps or plans, and described in the book of reference deposited with the clerk of the peace, unless where land had been omitted by mistake, and such mistake certified by two justices."

By section 59, "that the Company, in making the said railway, &c., should not deviate more than 100 yards from the line delineated in the map;"

By section 25, "that when damage done to a mansion was the subject of inquiry, such question should be tried by a special jury;"

And by section 235, it was enacted, "that no proceedings had or taken in pursuance of the act should be removed by *certiorari*."

The Company were said to have exceeded their power in three instances:—1st, by making the railway through a piece of land, not included in the plan or book of reference, and not certified to have been omitted by mistake; 2ndly, by deviating more than 100 yards from the line delineated; 3rdly, the inquisition related to damage done to a mansion, and did not purport to have been taken by a special jury.

Held, that the proper remedy for this excess of jurisdiction was by action of trespass, and the Court refused to grant a *certiorari*.

(*a*) See the inquisition, ante, p. 76.

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the clerk of the peace, was intended to pass across and over one of these closes, but that the Company had abandoned the line through that close, and set and marked out a new course for the railway.

That a great portion of the railway so marked out would deviate to a greater extent, and would be at a greater distance from the line delineated and laid down in the plans and book of reference, than is authorized by the act, being more than 100 yards therefrom; and that the railway, according to the line marked out for the same, as a deviation from the original line, was intended to pass into, through, and across a certain close, which was not marked, numbered, or delineated in the parliamentary survey, or mentioned in the books of reference and plans so deposited with the clerk of the peace: and that such omission of that close did not arise from inadvertence or mistake, and that the said mansion-house would be injuriously affected by the making of the railway.

The objections to the proceedings adopted by the Company, were, first, that they had made their railway through a piece of land not included in their plan and book of reference, and not certified to have been omitted by mistake; secondly, that they had deviated from their parliamentary line to the extent of 129 yards; thirdly, that for aught that appeared on the face of it to the contrary, the inquisition was taken by a common instead of a special jury, damage to a mansion being in question.

The clauses of the act 6 W. 4, c. xxxvi., used in the argument, were the 5th, 7th, 25th, 59th, and 235th (*a*).

Sir *W. Follett* and *J. Talbot* now shewed cause (*b*).—It has always been considered that *certiorari* would not lie, to remove an inquisition under a railway act; but, independently of the general law, by sect. 235 of this act, it

(*a*) See notes to the last case.

(*b*) Before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.

is provided, that no proceeding to be had or taken in pursuance thereof, shall be vacated for want of form, or be removed by *certiorari* or by any other writ or proceeding whatsoever.

Sir *J. Campbell*, Attorney-General, and *Fitzherbert*, contrà.—The case of *Rex* v. *The Trustees of the Norwich and Watton Road* (*a*), shews that an inquisition may be brought up by *certiorari*; and therefore the proceedings in this case are removable, if the clause respecting *certiorari* can be shewn not to apply. *Rex* v. *The Justices of the West Riding of Yorkshire* (*b*), *Rex* v. *The Justices of Somersetshire* (*c*), and *Rex* v. *The Parishioners of St. James's, Westminster* (*d*), shew, that where there is an excess of jurisdiction, a clause taking away *certiorari* will not prevent the interference of this Court, because it is not a proceeding under the act, but in derogation of it. [*Littledale*, J.—How is it possible for this Court to try excess of jurisdiction on affidavits?] If the question of excess of jurisdiction were in dispute between the parties, there would be great force in that objection; but in this case the excess of jurisdiction is admitted. It is sworn in the affidavits on which the rule was granted, and not denied in the affidavits on behalf of the Company, that the jurisdiction has been exceeded in three particulars.

First—section 59 restricts the power of deviation from the line delineated to 100 yards, whereas the Company have in some places deviated 129 yards. Secondly, according to the 5th and 7th sections, the railway and other works cannot be made on or through lands not delineated on the plan and described in the book of reference, unless in the case of lands omitted by mistake, and so certified by the justices. It appears that the Company, in making the

(*a*) 5 Ad. & Ell. 563; 1 N. & P. 32.
(*b*) 5 T. R. 629.
(*c*) 5 B. & C. 816.
(*d*) 2 Ad. & Ell. 241; 2 N. & M. 252.

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deviation complained of, go through a piece of land of a Mr. Knyfton, which is not included in the plan or book of reference, and is not certified to have been omitted by mistake: in order to do this, they have made use of the compulsory powers of the act, and have thereby shewn that they have *finally abandoned* the intention of pursuing the parliamentary line; *Lee and Others* v. *Milner* (*a*). Thirdly, the affidavits shew that Mr. Payne's mansion would be damaged by the proposed line; that such damage was one of the matters in dispute between him and the Company; and that this question was tried by a jury summoned in the way that common, and not special jurors, are accustomed to be summoned. [*Patteson*, J.—What do you say to the cases of *Rex* v. *The Justices of Cambridge* (*b*), and *Rex* v. *The Justices of the West Riding of Yorkshire* (*c*)?] The latter of these cases is distinguishable on the ground that there no excess of jurisdiction was alleged, but a mere error in the form in which the verdict was delivered; in the former case it was admitted that there were cases in which the Court would examine into want of jurisdiction upon affidavit; but as the justices certainly had jurisdiction, no sufficient grounds were there made out for such an inquiry.

Here the hardship is, that part of the land is within the jurisdiction, and part not; and the case of *Rex* v. *Saunders and Others* (*d*), shews that in a case where *certiorari* has been taken away by statute, if part of the subject-matter is within the protection of the *certiorari* clause, and part not, the whole may be removed. In consequence of part only of the land being within the jurisdiction, an action of

(*a*) 2 M. & W. 824; 2 Y. & C. 611; and see the judgment of the Lord Chancellor, in the case of *The River Dun Navigation Co.* v. *The North Midland Railway Co.*, ante, Vol. 1, p. 156.

(*b*) 2 Ad. & Ell. 370; S. C., 5 N. & M. 440.

(*c*) 1 Ad. & Ell. 563; S. C., 3 N. & M. 802.

(*d*) 5 D. & R. 611.

trespass is not a sufficient remedy, for the Company may enter on the part within the jurisdiction, and do great injury to the plaintiff, and yet not render themselves liable to an action.

Lord DENMAN, C. J.—We are unanimously of opinion that we ought not to interfere in this case. Granting that there was an excess of jurisdiction, the proper remedy for the party aggrieved was by action of trespass. This Court would be completely obstructed by applications of this kind, if a door were opened to them. In *Rex* v. *The Justices of Somersetshire* (*a*), there was no jurisdiction at all, and the whole proceedings, therefore, *coràm non judice*. Here there was substantially jurisdiction, though it may have been exceeded in some respects; and we must look on the clause taking away the *certiorari* as a provision intended to oust the jurisdiction of this Court, and leave parties to their remedy by action. If we were to hold that every trifling excess of jurisdiction prevented the operation of that clause, we should virtually repeal it.

Sir *W. Follett* then applied for costs, on the ground that the present application was entirely experimental, and on an affidavit that it had been preceded by an application to the Court of Chancery for an injunction, which had been discharged with costs.

Rule discharged with costs (*b*).

(*a*) 5 B. & C. 816.

(*b*) See the case of *Rex* v. *The Manchester and Leeds Railway Co.*, 8 Ad. & Ell. 413, 3 N. & P. 439, and 1 P. & D. 164; and the observations of Lord *Denman*, C. J., *Patteson*, and *Coleridge*, Js., in *Regina* v. *The Sheffield, Ashton-under-Lyne, and Manchester Railway Co.*, (ante, Vol. 1, p. 544,) as to the effect of these verdicts; which, by section 27, when signed by the sheriff or person presiding, are to be kept by the clerk of the peace, and are to be deemed *records to all intents and purposes*, and the same or true copies thereof allowed to be good evidence in all Courts whatsoever.

COURT OF CHANCERY.

F. W. TOMLINSON, Rector of Stoke-upon-Trent, Plaintiff,

against

THE MANCHESTER AND BIRMINGHAM RAILWAY COMPANY and Others - - - - Defendants.

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June 18*th*, 19*th*, 20*th*.

The plaintiff, the Rector of Stoke-upon-Trent, was empowered by an act of Parliament to sell the glebe lands, or to lay out the same for building purposes.

The provisional Committee of a Railway Company, who were soliciting an act of incorporation, by an agreement in writing contracted with the plaintiff to purchase a portion of the glebe which had been laid out for building, and the plaintiff, as part of the terms of the agreement, withdrew his intended opposition, and assented to the Railway Bill, which passed into an act.

THE bill stated an act of the 7 & 8 Geo. 4, enacting, that it should be lawful for the rector for the time being of the rectory of Stoke-upon-Trent, with the consent of the Bishop of Lichfield, and of the patron of the living, to sell and convey any portion of the glebe land belonging to the rectory, subject, however, to any leases that should have been granted of the same; and whereby power is given to the rector for the time being of the said rectory to lay out the glebe lands for building purposes.

That, at the time of entering into the agreements hereinafter mentioned, the plaintiff was and now is the rector of the said rectory; the defendant Tomlinson, the patron; and the defendant, the Right Rev. Samuel Butler, the bishop of the diocese.

That, in the year 1836, the defendant Garnett and

At the time of entering into the agreement, all the lands, except one field which was let to a tenant, were lying waste; and after the agreement, an agent of the Company conceiving that they had purchased and paid for the land, agreed to let the unoccupied portion from week to week, and received a small sum of the tenants of that portion of the land; but discovering his mistake, on the remonstrance of the plaintiff, he put an end to the tenancy, and tendered to the plaintiff the rent received. It was not determined whether the railway would pass through the glebe land.

On a motion that the Company might be ordered to pay into Court the amount of the purchase-money for the land,

Held, that although where a purchaser has taken and continues possession, he cannot retain it without paying the purchase-money into Court; yet that in the present case the agent of the Company having entered by mistake, and having quitted possession, the rule did not apply.

Quære, whether a Court of Equity will decree the specific performance of a contract by a railway Company to purchase land, if the Company should afterwards so exercise their powers as to disable themselves from taking the same land; and whether the vendor has any and what remedy in such a case.

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others were applying to Parliament for an act to establish a Company to be called "The Manchester South Union Railway Company" (*a*), and they were, by an indenture dated the 11th of March, 1836, subscribed to by the subscribers to the undertaking, appointed a provisional committee to carry the undertaking into effect, and to make contracts or agreements with landowners; and they were duly appointed trustees on behalf of the proposed Company for such purposes. That the defendants Garnett and others represented the proposed Company, and had full authority to bind the same; and it was understood between all the promoters of the undertaking, that the proposed Company, when incorporated, should adopt and be bound by all the contracts and engagements of the trustees and provisional committees. That, in the year 1837, a bill was brought into Parliament for forming the subscribers to the said undertaking into a Company. That Messrs. Few & Hamilton were the solicitors of the proposed Company. That the line of the proposed railway passed through parts of the glebe land of the rectory, authorized by the said act of the 7 & 8 Geo. 4, to be sold, and would alter and interfere with the designs and plans upon which the same had been laid out and divided by convenient roads or streets in the most advantageous manner for sale for building purposes. That the plaintiff had determined to oppose the passing of the Railway Bill, and informed the defendants, Garnett and others, of such his determination, who thereupon applied to him to treat for the purchase of such parts of the glebe lands as would be required for the railway, and for the site of a station for the district called the Staffordshire Potteries; and, after some negotiation, a deed of covenant was agreed to be entered into; and, in consideration thereof, the plaintiff, with the consent of the defendants, the Bishop of Lichfield and

(*a*) See the particulars of this act, and of the formation of the Company, ante, Vol. I. p. 68.

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the patron, agreed to withhold his opposition and to assent to the bill; and he in pursuance thereof assented thereto.

That an indenture, dated the 30th of March, 1837, was made and executed between the defendant Garnett and others, therein described as such trustees and members of the provisional committee aforesaid of the first part; the plaintiff of the second part; and the defendants, Tomlinson and the Bishop of Lichfield, of the third part. Whereby it was witnessed, that, in consideration of the agreement of the plaintiff thereinafter contained, the parties thereto of the first part, acting for and on behalf of the provisional committee by virtue of the power given to them by the said instrument of the 11th of March, 1836, and of all powers and authorities vested in them as aforesaid, or otherwise, and so as to bind, as far as practicable, all the subscribers to the undertaking, and all monies subscribed and to be subscribed for the purposes thereof; and the Company, when established, and all the funds and income of the Company; and also acting in their individual capacity, and so as to bind their respective estates, did jointly and severally, for themselves, their and each of their heirs, executors, and administrators, covenant, promise, and agree with the plaintiff and his successors, that, if the said Company should be incorporated, the Company should purchase the premises described, and part of which premises should be a principal station and depôt of the railway for passengers and merchandize for the district called the Staffordshire Potteries, and should be appropriated by the Company to such last-mentioned purpose; such appropriation having formed an inducement and consideration for a sale of the lands therein mentioned, at the price of £1000 for every statute acre, and so in proportion for every fractional part of an acre; and that such purchase-money should by and at the expense of the purchasers be paid into the Bank, pursuant to the provisions of the Railway Act, on the 29th of September,

1838; and, upon payment of such purchase-money, and not before, the Company should be at liberty to enter into possession of the purchased premises.

The agreement then proceeded to arrange and stipulate for the payment by the Company of the expenses attending the carrying the agreement into effect: and it was further witnessed, that, for the considerations aforesaid the plaintiff did agree, that he would not only withhold all opposition, but would assent to the Railway Bill; and further, with the consent of the parties thereto of the third part, testified by the now stating indenture under their respective hands and seals, the plaintiff did agree to sell to the Company the said lands required by them, at such price and on such terms as aforesaid: and also, that an abstract of title should be furnished, and that all necessary parties would concur in the conveyance to the Company. And it was further agreed, that in case the said bill should not pass into a law during the year 1837, the now stated agreement should be utterly void.

[The bill then stated the formation of the Company for establishing the Manchester, Cheshire, and Staffordshire Railway; the introduction of their bill into Parliament; the reference of the two railway bills to a Committee of the House of Commons; the agreement entered into by the respective promoters of the two lines; and the amalgamation of the two companies (*a*).]

That the promoters of the respective undertakings, during the progress of their respective bills through the said Committee, agreed to unite the two undertakings, and the subscriptions for the same respectively, and to make an amalgamated line of railway to be called "The Manchester and Birmingham Railway;" and they came to certain resolutions to give effect to the said union, by one of which it was declared, that all contracts and engagements entered into by the provisional committee of either Com-

(*a*) See ante, Vol. 1, p. 71.

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pany, should be specifically performed, and all purchases adopted by the united company; and that the individual members of both such committees should be wholly exonerated and protected by the united company from all claims and expenses in respect thereof. That the said Messrs. Few were appointed the solicitors of the proposed united company.

That a supplementary deed of covenant, dated the 10th of May, 1837, was made and executed between and by the defendants Garnett and Barrow, as the respective chairmen, for and on behalf of the respective provisional committees of the two Companies of the one part; and the plaintiff of the other part; whereby, after reciting the indenture of the 30th March, 1837, the two bills introduced into Parliament, and the aforesaid resolution; and that at meetings of the respective provisional committees, the defendants Garnett and Barrow, had been duly authorized to enter into the covenant thereinafter contained; it was witnessed that, for the considerations expressed in the indenture of the 30th of March, the said last-named defendants did, in the terms and in manner therein and hereinbefore recited, promise and agree with the plaintiff and his successors, that if the Manchester and Birmingham Railway Company should be incorporated by act of Parliament, the said Company should, if thereunto required by the plaintiff or his successors by writing addressed to the law clerk of the Company, within six months after the said act should pass, by deed, under the common seal of the Company, and at their costs and charges, ratify and confirm the indenture of the 30th of March, 1837.

[The bill then stated two resolutions respectively come to by the provisional committees of the Manchester South Union, and Manchester, Cheshire, and Staffordshire Railway Companies, authorizing the defendants, Garnett and Barrow, to execute, on behalf of the respective

Railway Companies, the indenture of the 10th of May, 1837.]

That the Manchester and Birmingham Railway Bill passed into an act on the 30th of June, 1837.

That on the 28th of September, 1837, F. W. Tomlinson, on behalf of the plaintiff, sent to the defendant Wheeler, the appointed law clerk to the Railway Company, an abstract of the title to the glebe land, and also sent therewith a letter, informing the defendant Wheeler that a deed of confirmation, as covenanted by the indenture of the 10th of May, 1837, to be executed under the common seal of the Company, had been prepared, and that the draft thereof would be forwarded to him in a few days, which was accordingly done. That the defendant Wheeler, by letter to F. W. Tomlinson, acknowledged the receipt of the draft deed, but objected to the preparation thereof, on the part of the plaintiff, and returned the draft deeds. The letter concluded thus:—"I beg to state, that I shall consider your letter to me of the 7th instant, as notice that by virtue of the provisions of the deed of the 10th of May, 1837, you require a confirmation of the contract of the previous 30th of March; and as you may wish to see the draft of such confirmation when prepared, and before engrossed, I shall send it to you." That the time within which, in pursuance of the deed of the 10th of May, a deed of confirmation under the common seal of the Company, embodying the provisions of the indentures of March and May, ought to have been executed and delivered to the plaintiff, having passed, the draft deed of confirmation sent by F. W. Tomlinson to and returned by the defendant Wheeler was engrossed, and, on the 10th of February, 1838, tendered on behalf of the plaintiff to the defendant Wheeler, for the purpose of the corporate seal of the Company being affixed to it; and by a letter sent therewith F. W. Tomlinson stated that the plaintiff and the defendants the patron and the bishop were ready to execute the deed, and also a counterpart

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thereof. That the said engrossment and letter having been left at the office of business of the defendant Wheeler, the former was on the 21st of February returned to F. W. Tomlinson.

The bill charged, that in consideration of the agreements contained in the indentures of the 30th of March and 10th of May, and on the faith that the Company would specifically perform the same, the plaintiff withheld all opposition in Parliament to the passing of the Railway bill, and assented thereto; that the Company had received and taken the full benefit of the plaintiff withholding his opposition. That the Company threaten, and, in fact, intend to make the railway, and to execute the works in such a manner as to avoid establishing a principal or any station of the railway, for the district called the Potteries, upon the glebe lands; and they sometimes threaten wholly to avoid, and not to use any of the glebe lands. That the establishment of such station formed a principal inducement and consideration with the plaintiff for withdrawing his opposition to the bill, and assenting thereto. That since entering into the agreements of the 30th of March and 10th of May, and in consequence and on the faith thereof, the plaintiff altered the plans and designs upon which the glebe lands were laid out and divided for building purposes, and caused new plans and designs to be made with reference to the railway and station, and entered into contracts with various persons according to such new designs, and incurred very heavy expenses in consequence thereof.

The bill prayed, that it may be declared by the decree of this Court, that the nonperformance of the provisions and agreements of the indentures of the 30th of March and 10th of May, 1837, respectively contained in favour or for the benefit of the plaintiff, or the Rector of Stoke-upon-Trent for the time being, is or would be a fraud; and that it may also be declared that the Railway Company are in equity

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bound by the indentures of the 30th of March and 10th of May, 1837, respectively. And that the Company may be decreed to execute under their common seal the said engrossment so tendered to the defendant Wheeler, on the part of the plaintiff as aforesaid, or another proper deed for the purpose aforesaid; and that all the defendants hereto, except the defendants the Bishop and patron, may be decreed to pay the plaintiff the costs, charges, and expenses of the plaintiff in preparing and engrossing the same, and all other the costs, charges, and expenses to which by virtue of or under the said indentures or either of them the plaintiff is entitled; and that the several agreements and provisions in the indentures of the 30th of March and 10th of May 1837 respectively contained, for the benefit or in favour of the plaintiff, or the Rector of Stoke-upon-Trent aforesaid, or such of them of which it is fit to enforce a specific performance may be specifically performed, and carried into execution under the direction of the Court. And that the Railway Company, their agents, servants, and workmen, may be restrained from making the railway or executing works under their act of Parliament, so and in such manner as to avoid the glebe lands; and also from making such railway or executing any of such works without the establishing a principal station and depôt of the railway for passengers and merchandize for the district called the Staffordshire Potteries, upon the said glebe lands, conformably to the said indentures; and from doing any act, matter, or thing with the view or for the purpose of making the railway or of executing the said works, so as to avoid establishing such principal station and depôt there, and otherwise infringing the agreements and provisions in the said indentures of the 30th of March and 10th of May, or either of them contained. And for further relief.

The defendants, the Manchester and Birmingham Railway Company, by their answer stated, that the terms and stipulations contained in the agreement of the 30th of

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March, 1837, in favour of the plaintiff, were most unreasonable, and particularly that the stipulation as to making a station, was one which ought not to have been entered into, as thereby the site of such principal station, which ought to be regulated solely with a view to the convenience of the public, was fixed and determined with reference only to the private advantage of the plaintiff. The answer submitted to the judgment of the Court, whether the Company were bound in equity, or ought to be decreed specifically, to perform all contracts entered into by the provisional committees of the two Companies, and insisted that in no event ought they to be decreed to perform the agreement with the plaintiff, until they should enter upon or take possession of the land mentioned in the indenture of March, 1837, or some part thereof; and even in that case ought not to be decreed to make a principal station upon the said glebe lands, or perform any of the other provisions of the said contract, except purchasing such lands as they may require at the price mentioned in the said agreement. The answer stated, that after the receipt by the defendant Wheeler of the letter of F. W. Tomlinson, Wheeler began to prepare a draft deed of covenant, for the purpose of being entered into by the Company and the plaintiff. [The answer set forth the draft deed.] That before the draft deed was completed, the Company were desirous of being advised how far they were bound or justified in executing any deed for carrying the agreement of March, 1837, into effect, particularly as they had then ascertained that the line of railway authorized by the act of Parliament was not the best line, and as, consequently, they considered it probable that they should have to apply to Parliament for authority to make a deviation. That the defendant Wheeler laid a case before Sir W. Follett on behalf of the Company, thereby asking advice, whether the directors could legally and safely perform the agreement of March and May, 1837, without incurring liability

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as between themselves and the shareholders for a misappropriation of the money of the Company. That in answer to such case, Sir W. Follett said, "That considering the precise nature of the stipulations in the deed of March, 1837, and the other circumstances of the case, he thought the directors ought to take the opinion of the Court of Chancery, before they incurred the great expense of carrying the agreements of March and May, 1837, into effect." That under such circumstances, the Company determined not to execute any deed binding themselves to perform the said stipulations, unless they should be decreed to do so by this Court. That under such circumstances the defendant Wheeler never completed the draft which, as aforesaid, he had begun to prepare; and consequently never sent the same to F. W. Tomlinson. That the Company have not yet entered upon or taken possession of, or sought to enter upon or take possession of, any part of the plaintiff's lands. That the Company do not know at present whether they shall ever have occasion to take or use any of the said glebe lands, as they have been advised that it will be greatly for the advantage of the public that the line of railway should be changed. That the Company did, in March 1838, take the steps required by the standing orders of the House of Commons, with the view of applying to Parliament for an act to authorize the alteration of the line. That the proposed new line will not pass through any part of the lands of the plaintiff; and consequently, if they shall obtain such act, they will avoid taking any part of such lands.

The answers of the other defendants were put in. The defendant, John Tomlinson, the patron, died, and the suit was duly revived against his devisees in trust of the advowson of the rectory.

The plaintiff, on the 15th of September, 1839, filed his supplemental bill, thereby stating that the Company had abandoned their intention of applying to Parliament for

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an act to authorize a deviation of their line; and that the defendant, R. Sharpe, had sent to the plaintiff a letter dated the 24th of September, 1838, as follows:—"I have to intimate to you, that the directors of the Company have determined not to seek powers to vary the line of railway: the intention to deviate being thus abandoned, the railway will be constructed under the provision of the present act, and in the course then authorized; your land will be required, being the identical property which was made the subject of contract with the late South Union Company. Your case now falls within the principle which has guided the directors in their proceedings with landowners; namely, to give effect in every instance to arrangements made before the passing of the act, where, since the passing of the same, the state of facts contemplated in such arrangements has substantially arisen. You will therefore be good enough to receive this communication as an official intimation that the contract with you will be performed, and the directors have given the necessary instructions to that effect to their law clerk. The directors lose not a minute in apprising you that the Parliamentary line will be the line constructed; and therefore as your land comprised in the contract will be actually taken by the Company, the contract will be performed." That since the date of the answers to the original bill, the Company's surveyors have marked out the line of the railway through the said glebe lands; that, in order to enable the plaintiff to give possession of the glebe lands, the tenants of part thereof received notice to quit at Lady Day last, (1839), at which time they accordingly quitted; and since that time the Company, without any communication with, and without the knowledge of, the plaintiff, have taken possession of the lands, and through their agents have let divers parts thereof to new tenants whose names are unknown to the plaintiff, and have through their agents received rent for the same; and the Company have ever since continued

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and now are in the possession or receipt of the rents and profits thereof, and the plaintiff is advised that the Company have waived any objections made by them and the other defendants, and all other objections, if any, to the specific performance of the contract contained in the indentures of March and May, 1837. That the Company know what quantity of the glebe land is required for the railway and station, and the amount of the purchase-money to be paid for the same. The supplemental bill prayed that it may be declared that the Company had waived all objections to the said contract, and are bound to perform the same; and that until the execution by the Company of the engrossment tendered to the defendant Wheeler on the part of the Company, or of another proper deed for the same purpose, and until payment by the Company of the purchase-money for the lands pursuant to the aforesaid indentures, or until such time as to this Court shall seem meet, the Company may be restrained from making the railway upon the glebe lands, and from committing any waste upon such lands, and from entering into possession or receipt of the rents and profits of any further or other part of the lands, and from receiving any further rent in respect of the lands of which they have so as aforesaid taken possession; and for further relief.

The answer of the defendants, the Company, to the supplemental bill, stated, that it was then very uncertain whether the defendants would or not construct the railway according to the Parliamentary line. It admitted that if the Company should construct the railway according to such line, it would pass through the said glebe lands, and would require some part, but not the whole, of the identical lands. The subject of the aforesaid contract stated that in December, 1838, at the time when the Company had abandoned their intention of deviating from the Parliamentary line, Mr. Barlow, an engineer of the Company, marked out the line of the railway through the glebe lands, by driving

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short stakes at certain distances. That at the time when the aforesaid contract was entered into, all the lands comprised in the said contract, except one field which was let to a tenant of the name of Brooks, were lying waste and unoccupied, the same being intended for building purposes. That in April, 1839, at a time when the Company intended to make the railway according to the Parliamentary line, one W. Bromley applied to Mr. Barlow, and offered to rent from the Company as grazing land, until they should want the same, that part of the glebe land which he understood the Company had agreed to purchase; and Mr. Barlow, believing that the Company had actually purchased and paid for the same, agreed on their part to let the land from week to week at 1*l.* 10*s.* per week. That thereupon Mr. Bromley entered into possession of, and continued to hold, the land until the 15th of June, 1839. That Mr. Barlow received of Mr. Bromley 5*l.* 10*s.* for rent, and expended the sum of 1*l.* 10*s.* in repairing the fences and gates on the land; that Mr. Barlow has been directed by the Company to pay the whole of the 5*l.* 10*s.* to the plaintiff. That Mr. Barlow in the month of May, 1839, under the belief that the land had been purchased and paid for, received of the said Mr. Brooks 18*s.* in respect of the rent of the land occupied by him. That shortly after such receipt the plaintiff wrote to Mr. Brooks, requiring him to pay his rent for his piece of land to him, and Mr. Brooks thereupon shewed the letter to Mr. Barlow. That Mr. Barlow was thus led to expect that he had committed some mistake in receiving such rent and in letting the land, and he thereupon on the 8th of June called upon and saw the plaintiff on the subject, and the plaintiff then stated "that the Company had no right whatever to let the land, as they had not paid for the same and were not in possession thereof." That Mr. Barlow, immediately upon receiving such information, declined letting the land any longer, and Mr. Bromley thereupon ceased to occupy

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the land. That Mr. Barlow also repaid to Brooks the 18*s.* received from him. That the quantity of land which would have been required for the railway would have been 6a. 1r. 35p. That the quantity which would be required for a station has never been measured or marked out. That it is now uncertain whether the Company will be able to construct a railway through the Potteries and the parish of Stoke-upon-Trent; and, until it shall be known whether they will be able to construct such line, the Company are unable to say whether in fact they ever will require any of the lands comprised in the indentures of March and May 1837, or any of the glebe lands of the said rectory.

The plaintiff moved that the Company might be ordered to pay a sum of £15,098 into Court. The motion was supported by an affidavit; other affidavits were filed on both sides; a question was made as to their admissibility, but they were read by consent. The only one of such affidavits which is noticed in the judgment stated,—that the quantities of the several parcels of land, as measured and ascertained by a surveyor, comprised in the indenture of the 30th of March, 1837, and thereby agreed to be purchased at the rate of £1000 for every statute acre, amount altogether to 14a. 3r. 18½p., and the purchase-money for the same will be the sum of 14,865*l.* 12*s.* 6*d.*; and the interest of such purchase-money, computed after the rate of 5*l.* per cent. per annum from the 29th of September, 1838, to the 25th of March, 1840, amounts to the further sum of 1114*l.* 17*s.* 8*d.*

Mr. *Knight Bruce* and Mr. *G. Lake Russell*, in support of the motion.—This case will be governed by the ordinary rule of this Court relating to vendor and purchaser. Possession of the lands has been taken by the purchaser in a manner not stipulated for by the agreement, and without the consent of the vendor. The act of possession cannot

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be denied; for the Company have let a portion of the land, and have received rent for it: neither can it be disputed what is the quantity of land; for the Company's engineers have marked out the line of the railway, and have thereby determined the quantity: this is ascertained by affidavit, which being one merely of computation, is admissible. It is too late to question the now established principle of law, that a corporation is bound by a contract to which the common seal may not have been affixed. *Marshall* v. *The Corporation of Queenborough* (*a*), *Beverley* v. *The Lincoln Gas Light Company* (*b*), *Church* v. *The Imperial Gas Light Company* (*c*), *Younge* v. *Duncombe* (*d*).

Mr. *Wigram*, Mr. *Koe*, Mr. *Lowndes*, and Mr. *Sharpe*, contrà.—The fact whether the Company have or have not taken possession of this land will be a most important fact to be decided at the hearing. The Railway Act allows the Company to enter upon lands for the purpose of staking out their line, and expressly excepts an entry for such purpose from the terms imposed as preliminary to the taking possession of land. The rule of this Court is, that a purchaser cannot hold possession, and at the same time retain the purchase-money; he must, if required to do so by the vendor, exercise an option whether he will give up possession or pay his purchase-money into Court: *Clarke* v. *Wilson* (*e*), *Smith* v. *Lloyd* (*g*), *Wickham* v. *Evered* (*h*), *Morgan* v. *Shaw* (*i*), *Tyndall* v. *Cobham* (*k*). Even if what is relied on as constituting a taking of possession amounted to such an act, it was a mistake committed by their agent, which on a remonstrance made by the plaintiff was rectified by giving it up.

(*a*) 1 Sim. Stu. 520.
(*b*) 6 Adol. & Ell. 829.
(*c*) Id. 846.
(*d*) Younge, 275.
(*e*) 15 Ves. 317.
(*g*) 1 Madd. 84.
(*h*) 4 Madd. 53.
(*i*) 2 Mer. 113.
(*k*) 2 Myl. & Keen, 385.

The Company contend, that should the railway not be made to pass through the glebe lands, they will not be able or compellable to take any portion of the lands; an order on them to pay the purchase-money into Court would be deciding on an interlocutory application, that the contract in question is one which the Court will be bound by decree to compel the performance of. There are two difficulties in arriving at such a determination: First,—the contract has not been entered into by a Company, or by their agent duly authorized (*a*); secondly,—the contract is not under the common seal of the Company. *Edwards* v. *The Grand Junction Railway* (*b*), has decided that a violent act shall not be done to the land of a person, whose opposition to the act of Parliament conferring the power of doing that act, has been disarmed by a prior agreement; but neither that case nor any other case has gone the length of deciding that, where a given sum has been agreed to be paid for the purpose of preventing opposition to a railway act, this Court would lend its aid to enforce that agreement without regard to injury to property (*c*). In a sale of lands a corporation is only bound by an executed agreement: *Charlton* v. *The Corporation of Ludlow* (*d*).

Should the railway not be completed, the land will, by virtue of a clause of the act, revert to the owner; is he to have both land and purchase-money?

Mr. *K. Bruce*, in reply.—The Company have, by their answer and by letter, submitted to perform the contract. The entry on the land has been made under the powers conferred by the act; and *Edwards* v. *The Grand Junction Railway Company* has definitively settled, that a Company shall not avail themselves of any one power conferred by

(*a*) 29 Car. 2nd, c. 3, s. 4.
(*b*) 7 Sim. 337; 1 Myl. & Craig, 650; *ante*, Vol. I, 173.
(*c*) See *Simpson* v. *Lord Howden*, *ante*, Vol. I., pp. 326, 347.
(*d*) 6 Mee. & W. 815.

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their act, without performing an obligation which assisted to procure for them the passing of that act.

Cases regulating the payment of money into Court by purchasers, admit of two divisions: 1st, cases where the possession is taken under the contract, or is inconsistent with it, and the purchaser has not dealt improperly with the estate; there the money is not ordered into Court: 2ndly, if the possession by the purchaser without payment of the money is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership—for example, cutting timber, by which the property is lessened in value—there the Court will interpose, and compel the purchaser to pay the purchase-money into Court (*a*), *Crutchley* v. *Jerningham* (*b*), *Clarke* v. *Elliott* (*c*), *Boothley* v. *Walker* (*d*), *Younge* v. *Duncombe* (*e*), *Tindal* v. *Cobham* (*g*).

Mr. *Jacob* appeared for the other defendants.

The VICE-CHANCELLOR.—Questions of this kind depend upon the peculiar circumstances of each case. I admit that, if a purchaser has deliberately taken possession, without the consent of the vendor, it may, in some instances, be a reason for the Court to order the purchase-money to be paid in: that might be so even if the purchaser was willing to give up the possession. It is the ordinary rule of the Court where possession has been taken by a purchaser, and he is in possession, not to permit him to retain possession and at the same time keep back the purchase-money. This case appears to be totally different from all the cases I recollect; it is a dispute about

(*a*) Sugd. V. & P., Vol. I., 360, 10th (last) edition.
(*b*) 2 Mer. 502.
(*c*) 1 Madd. 606.
(*d*) 1 Madd. 197.
(*e*) Younge, 275.
(*g*) 2 Myl. & Keen, 385.

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a mere act of possession, and it appears to me that the acts relied on as constituting a taking of possession by the Company, have been done under a mistake: I do not think that the answer or the affidavits shew a deliberate intention to take possession in the ordinary way.

In consequence of an application by a Mr. Boyle, Mr. Barlow, who was only an agent of the Company, and had no thing more to do with the letting of the land or the taking possession of it than any other subordinate officer of the Company, did take upon himself to write, in fact did write, a letter to Mr. Hilton, the bookkeeper of the Company; and it is strange that he should communicate with a person in Mr. Hilton's situation about the letting of land, but probably he was in the habit of communicating with him respecting other matters. Now that letter, which is dated the 5th of May, is as follows:—"I am requested by a gentleman of the name of Boyle, to inquire whether the Company would be willing to let as grazing-land that part of Winton's Wood which is in their possession, until such time as it is required by the Company for other purposes. Should the directors be favourable to Mr. Boyle's proposition, he would feel obliged by being informed how many acres he can have, and on what conditions as to price. At present many persons are making use of this same land for their cattle, without having even courtesy enough to ask for permission." Then Mr. Barlow, in his affidavit says, that at the time of sending the letter, he believed that the Company had bought and actually paid for the land. That on the 19th of May he received from Mr. Hilton a letter as follows:—"The directors give you liberty to use your own discretion about letting the land, being mindful only to have it understood from week to week." Then the affidavit goes on to say, that on the receipt of the letter he let the land to Bromley, and states that a small sum, 5*l.* 10*s.*, was received for rent, of which a part, 1*l.* 10*s.*, was expended in repairs. Then it says that the deponent had received 18*s.*

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from Brooks; and that he was informed that he, deponent, had committed a mistake in letting the land; whereupon, on the 10th of June, he wrote the following letter to J. Hilton or Mr. Lyon (Mr. Lyon being one of the Directors):— "Having had some conversation with Mr. Tomlinson, and seen the plan attached to his agreement, I have ascertained the quantity of land stipulated for therein, and find that I have let more land than is mentioned in the agreement. Mr. T. denies our right of letting any part of the land; because he says it is not paid for, consequently not in the possession of the Company. Under these circumstances, and to avoid any unpleasantness, I have declined letting the land any longer." It appears that attempts were made in the latter part of the year to repay what had been received for rent.

It seems to me to be undeniable that what Mr. Barlow did, he did under a mistake. I do not understand the Company to be actually in possession, or even under the circumstances stated to have constructive possession: there is nothing like a possession.

This bill was filed for a specific performance, and subsequently there was a supplemental bill, an answer to which was put in January, 1840; and it appears that, at the time when the answer was filed, the agents of the Company had endeavoured to rectify the mistake; and now in the month of May an application is made to this Court, in effect, that the Company having taken possession should be ordered to pay their purchase-money into Court; but it appears to me that there is nothing in the case to justify the Court in ordering the money to be paid in. It has struck me that there is this remarkable circumstance in the case,— the Company have their power to make the railway through Stoke-upon-Trent or to make it not through Stoke-upon-Trent; and if they should not make it through Stoke, then they will not be authorized to purchase any land in the parish of Stoke-upon-Trent.

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I am strongly of opinion that as far as the contract goes, it is a contract to take the land and to do the works there specified; yet if the Company do elect not to carry their railway through Stoke, it might be very difficult for this Court to decree a specific performance of an agreement to take land, which the defendants are disabled from taking: whether the plaintiff might not have some relief against the Company on other grounds, I have not now to consider. The Company may have led on the plaintiff, the owner of land which he had a design of laying out in a certain speculation, to give up that scheme in favour of the public convenience—public convenience I take to mean whatever the Railway Company think the best for their own advantage; and I do not say that in this respect there might not be some relief in this or in some other Court; but I think it would be too much, on a motion to pay money into Court, to conclude that the land is at all events to be thrust upon the Company as purchasers. I shall not order the money to be paid into Court; but as the mistake has been occasioned by the agents of the Company, it would be too much to order the costs to be paid by the plaintiff, so that I merely refuse the motion.

Between Her MAJESTY'S ATTORNEY-GENERAL, at the relation of T. E. DICEY and others, - - - - - Plaintiffs,

and

The BIRMINGHAM and DERBY JUNCTION RAILWAY COMPANY, - - - Defendants.

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Aug. 8*th*.

The Birmingham and Derby Junction Railway commencing at Derby, communicates with the London and Birmingham Railway at Hampton-in-Arden. The Midland Counties' Railway forms a communication between Derby and the London and Birmingham Railway at Rugby.

THE bill stated an act of Parliament passed in the sixth year of the reign of Will. 4, intituled, "An Act for making a Railway from the London and Birmingham Railway, near Birmingham, to Derby, to be called 'The Birmingham and Derby Junction Railway,' with a branch." Whereby, after reciting the public advantage to arise from the making of the railway, it was enacted, that the several persons therein named, their several and respective successors and assigns should be, and they were thereby united into a Company for making and maintaining the railway and branch railway; and for that purpose were created a body corporate by the name of "The Birmingham and Derby Railway Company," with power to make the railway and branch railway, and to purchase lands for the purpose.

The Birmingham and Derby Railway Act empowers that Company to receive from passengers conveyed by the Company's carriages, tolls not exceeding a specified amount.

A subsequent act, for authorizing an alteration in the line of the railway, provides, that the charges by the first act authorized to be made for the carriage of passengers, goods, or other matters or things, shall be at all times charged equally and after the same rate per ton per mile, in respect of all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances, and that no reduction or advance in any charge for conveyance by the Company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the railway under the same circumstances.

After the opening of the Midland Counties Railway, the Birmingham and Derby Junction Railway Company charged passengers conveyed by their carriages from Derby to Hampton-in-Arden 8*s*., while they charged other passengers proceeding from Derby to Hampton-in-Arden, and thence to London, only after the rate of 2*s*. between Derby and Hampton-in-Arden.

An information was filed, praying an injunction to restrain the imposition of an unequal charge between the termini at Derby and Hampton. It was admitted by the information that the charge of 8*s*. did not exceed the rate allowed by the Act.

Held, by the Lord Chancellor on a motion for an injunction, that the clause above set forth was only meant to prevent the exercise of a monopoly to the prejudice of one passenger or carrier and in favour of another. That, even if this Court had jurisdiction in such a case, it would not interfere, unless it were clear that the public interest required it; and that in this case, it being admitted that the higher charge was not more than the act permitted, it did not appear that the public were prejudiced by the arrangement. The motion was refused with costs.

Junction Railway Company," and by that name were and are enabled to sue and be sued.

The bill then stated the 5th section of the act, empowering the Company to make and maintain the railway over the lands delineated on the maps or plans deposited with the respective clerks of the peace, for the several counties therein named. The 128th section enacts, that all persons shall have free liberty to pass along and upon, and to use and employ the railway with carriages properly constructed, as by the act directed, upon payment only of such rates and tolls as shall be demanded by the Company, not exceeding the respective rates and tolls by the act authorized, and subject to the provisions of the act, and to the rules and regulations which shall from time to time be made by the Company, or by the directors thereof, by virtue of the powers by the act granted. The 130th section enacts, that it shall be lawful for the Company to demand, receive, and recover, to and for the use and benefit of the Company, for and in respect of passengers conveyed in carriages upon the railway, any tolls not exceeding the following; that is to say, for every person conveyed in or upon any such carriage, the sum of two pence per mile. The 131st section enacts, that it shall be lawful for the Company to hire and provide locomotive or stationary engines, or other power for the drawing or propelling of any articles or persons upon the railway, and also along and upon any railway communicating therewith, and to receive, demand, and recover such sums of money for the use of such engines or other power as the Company shall think proper, in addition to the several other rates, tolls, or sums by the act authorized to be taken. The 132nd section, which, after authorizing the Company to carry passengers upon the railway, and upon any railway, communicating therewith, and to make reasonable charges for such conveyance, provides, that it shall not be lawful for the Company to charge for the conveyance of any passenger any greater sum than

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the sum of threepence half-penny per mile, including the rate or toll thereinbefore granted. The 135th section enacts, that nothing in the act contained shall be construed to prevent the Company from making any agreement with any person for the hire or use of any locomotive engine or other power, or of any carriage, and to charge for the same in manner in the act mentioned. The 155th section, reciting, that it would tend much to the convenience of the public if Railway Companies were empowered to enter into mutual arrangements so as to avoid the necessity of a change of carriages and other delays, enacts, that it shall be lawful for the Company to enter into any contract with any other Railway Company, either for the division or apportionment of the rates, tolls, and duties, or for the passage along or over the railway of any engines, coaches, waggons, or other carriages, which shall pass over or along any other line of railway, or for the passage over or along any other line of railway of any engines, coaches, waggons, or other carriages which shall belong to the Birmingham and Derby Railway Company, upon the payment of such rates, tolls, or duties, and under such conditions and restrictions as may be mutually agreed upon: provided that no such contract shall in any manner alter, affect, increase or diminish any of the rates, tolls, or sums which the respective Companies, parties to such contract, shall for the time be respectively authorized to have, demand, receive, or recover of or from any other person or any other Company; nor shall any such contract give any preference or advantage to any Company or person party thereto over any other Company or person, but all such Companies and persons so contracting, shall, notwithstanding such contract, pay the same amount of rates, tolls, and sums, as shall from time to time be charged to other Companies or persons not being parties to such contracts.

The bill then stated a second act of Parliament, passed in the first and second years of the reign of her present

Majesty, intituled "An Act to alter the Line of the Birmingham and Derby Junction Railway;" and a third act, passed in the third year of the reign of her present Majest, (c. 51), intituled, "An Act to make a further Alteration in the Line of the Birmingham and Derby Junction Railway;" by the 63rd section of which last act, it is enacted, that the charges by the first recited act, authorized to be made for the carriage of any passengers, goods, or other matters or things to be conveyed by the Company, shall be at all times charged equally and after the same rate per mile, or per ton per mile, in respect of all passengers, and of all goods or carriages of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances; and no reduction or advance in any charge for conveyance by the Company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the railway only, and under the same circumstances as aforesaid.

That the Company have made part of the railway authorized to be made, forming a railway from Hampton-in-Arden in the county of Warwick, where the same joins the London and Birmingham Railway, to Derby, being a distance of thirty-eight miles, and they convey upon the railway passengers, goods, and merchandize, in trains consisting of carriages of various descriptions propelled by locomotive engines provided by such Company, and for which they charge various sums fixed by themselves, and such railway is now the only available means of public conveyance between Hampton-in-Arden and Derby, and between those places and many other places between which the line of communication passes through Derby and Hampton-in-Arden. That the Company, in contravention of the provisions of the said recited acts and particularly of the thirdly recited act, take upon themselves

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at their discretion to charge different rates at the same time, in respect of passengers, goods, and carriages of a like description conveyed or propelled by the same or a like carriage or engine, and passing on the railway between the same places, and under the same circumstances, and to reduce their charges in favour of particular persons travelling upon and using such railway under the same circumstances. That the charge made by the Company for the conveyance of a single passenger upon the railway by an ordinary train, from Hampton-in-Arden is 8*s.* in first, 6*s.* in second, and 4*s.* 6*d.* in third class carriages, unless such passenger be proceeding along the London and Birmingham Railway to or from Hampton-in-Arden for the whole distance from or to London, in which case the charge for the conveyance of such passenger from Hampton-in-Arden to Derby, or from Derby to Hampton-in-Arden, is 2*s.* and no more in first, and 1*s.* 6*d.* and no more in second class carriages; and with respect to passengers proceeding to or from Hampton-in-Arden along the London and Birmingham Railway from or to any place short of London, the larger charges of 8*s.* and 6*s.* respectively are made by the Company for conveying them from Hampton-in-Arden to Derby, or from Derby to Hampton-in-Arden. That the passengers in respect of whom such different charges as aforesaid are made, are conveyed by the same trains, propelled by the same engines, and in the same or the like carriages, and pass on the railway under the same circumstances, within the intent and meaning of the thirdly recited act; and they ought to be charged after the same rate.

That on the 30th of June, 1840, the Midland Counties Railway, which joins the London and Birmingham Railway at Rugby and proceeds from thence to Derby, was opened, and the distance from London to Derby along the London and Birmingham Railway to Rugby, and from thence along the Midland Counties Railway to Derby, is less by eleven miles, than the same distance along the

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London and Birmingham Railway to Hampton-in-Arden, and from thence along the London and Derby Junction Railway to Derby; and the Company have fixed the aforesaid unequal charges, since the opening of the Midland Counties Railway, in order to induce passengers, goods, and merchandize to be conveyed to Derby by way of their railway; and for that purpose have made a reduction in the charge for conveyance by them in favour of persons travelling upon the railway between Hampton-in-Arden and Derby, who are proceeding from or to London along the London and Birmingham Railway, and who would otherwise travel by the Midland Counties Railway, although such persons travel upon and use the railway between Hampton-in-Arden and Derby, under the same circumstances with persons in favour of whom no such reduction is made.

That the practice aforesaid is injurious to the public generally, and is unlawful within the intent and meaning of the said recited acts.

The bill, amongst other things, charged, that the charges made by the London and Birmingham Railway Company for conveying a single passenger between London and Hampton-in-Arden is 27*s.* 6*d.* in first, and 18*s.* in second class carriages, and the charge made for conveying a single passenger between London and Derby, when the same is paid in one sum in London or at Derby, is 29*s.* and 19*s.* 6*d.*, and the sums of 27*s.* 6*d.* and 18*s.* in respect of each passenger are invariably accounted for, and paid to or retained by the London and Birmingham Railway Company, and the sums of 2*s.* and 1*s.* 6*d.* and no more are accounted for and paid to or retained by the Birmingham and Derby Junction Railway Company. That it oftentimes happens that passengers arrive at Hampton-in-Arden along the London and Birmingham Railway by the same train and in the same carriage or of the same description, some of whom have come from London and some

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from Coventry or other places short of London, and such passengers proceed from thence by the same train without any change of carriage, or in carriages of the same description, along the Birmingham and Derby Junction Railway to Derby, and the charge for conveying the former of such passengers is 2*s*., and for conveying the latter 8*s*.

The bill prayed, that it may be declared that the charges made by the Company for the carriage of passengers, horses, carriages, goods, merchandize, and other articles and things conveyed by the Company, and passing on the line of the railway for the whole distance between Hampton-in-Arden and Derby by the same or the like trains, propelled by the same or the like carriages, ought to be charged equally and after the same rate, whether such passengers, horses, carriages, goods, merchandize, and other articles and things, proceed on, or are conveyed along the London and Birmingham Railway for the whole distance, from or to London or not; and that the practice now adopted and pursued by the Birmingham and Derby Junction Railway Company, as hereinbefore particularly mentioned, is contrary to the provisions and the true intent and meaning of the several acts of Parliament hereinbefore mentioned; and more especially the act of the third year of the reign of her present Majesty. And that the Company, their officers, clerks, engineers, and servants, may be restrained from making charges, or any charge, for the carriage of any passengers, horses, carriages, goods, merchandize, or other articles or things conveyed by such Company, and passing on the line of the railway for the whole distance, between Hampton-in-Arden and Derby, by the same or the like trains, propelled by the same or the like engines, and in the same or the like carriages, after lower rates, or any lower rate in respect of such passengers, horses, carriages, goods, merchandize, articles or things, as pass or proceed along the London and Birmingham Railway, for the whole distance,

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between London and Hampton-in-Arden, than the rates or rate charged by such Company, in respect of such of the same passengers, horses, carriages, goods, merchandize, articles, and things, as do not pass or proceed along the London and Birmingham Railway at all, or so pass or proceed for a distance short of the whole distance between London and Hampton-in-Arden; and from otherwise directly or indirectly making charges for the carriage of passengers, horses, carriages, goods, merchandize, or any other articles or things conveyed by the Company, and passing on the line of the railway for the whole distance, between Hampton-in-Arden and Derby, by the same or the like trains, propelled by the same or the like engines, and in the same or the like carriages, after unequal or different rates.—And for general relief.

The information was supported by affidavits of the facts therein stated.

Mr. *Wigram*, Mr. *Turner*, and Mr. *James Parker*, in support of a motion in the terms of the prayer of the bill (*a*), contended that the act had expressly provided, that persons conveyed by the Company's carriages between the termini Derby and Hampton-in-Arden, should be charged after one uniform rate of mileage. That the affidavits in support of the information shewed that the Company were in the habit of charging unequal rates or fares; and that this Court would interfere by injunction. *Attorney-General* v. *Mayor of Galway* (*b*).

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Bacon*, for the Company, were not required to address the Court.

(*a*) Owing to the press of business in the Vice-Chancellor's Court, the motion was, by permission of the Lord Chancellor, made before his Lordship.

(*b*) 1 Molloy, 95.

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The LORD CHANCELLOR.—The jurisdiction of this Court is of a very expansive nature, but I do not think it is likely to be expanded to the extent of this application. Supposing the Attorney-General has a right to appear for persons who pay too much as well as those who pay too little, I think before I administer the assistance of this Court, I should feel satisfied that the interest of the public requires it. Now it is clear that this Company does not charge more than the act authorizes them to charge from Derby to Hampton-in-Arden. If they do, there is another remedy for the public, but that is not the complaint before me. I assume, therefore, they charge that which they have a right to charge within their limits, between Derby and Hampton-in-Arden, therefore the Attorney-General now asks me to interfere to prevent the Company carrying passengers at too cheap a rate. This is evidently the true complaint; because it is not denied that they carry those who are going to Hampton-in-Arden at the charge which they are authorized to make, but persons travelling under other circumstances, not intending to stop there, but going on to London, are, according to the Attorney-General's complaint, charged 2*s*. instead of 8*s*. Now I do not know who will suffer by that arrangement, whatever may be the cause of it. But it is not necessary to say anything about the jurisdiction of the Court, or how far I should interfere if I had the power, because I am quite clear that the 63rd section has not the slightest reference to this case. That was for the purpose of preventing those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals, that is to say, that they shall not be at liberty to carry the goods of one manufacturer and refuse the goods of another. It was to give an equal right to the public to the conveyance, and if there was any doubt about the earlier part of the clause, the latter part of the clause is in

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terms so: "and no reduction or advance on any charge for conveyance by the said Company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the same portion of the said railway only and under the same circumstances as aforesaid." That was the object of the clause, and not to prevent the Company from making such arrangements within the powers of their act as they might find most convenient to themselves. I think this is an experiment which is not likely to be repeated, and I shall dismiss the motion with costs.

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Between JOSEPH PRIESTLEY, - - - Plaintiff

and

The MANCHESTER AND LEEDS RAILWAY COMPANY and J. B. BRACKENBURY - Defendants.

Feb. 12th, Mar. 5th & 6th.

The Manchester and Leeds Railway Act enables the Company to make the railway in a prescribed course.

THE bill which was filed by the plaintiff as clerk to the Aire and Calder Navigation Company, hereinafter called the undertakers, stated an act of Parliament of the 10 &

The 34th section, reciting that the railway is to be carried across the Aire and Calder navigation, at three specified places, requires the Company to erect bridges at such three crossings, and prescribes the dimensions of such bridges.

The 38th section provides that the Company shall, during the progress of constructing such bridges, leave an open uninterrupted navigable water-way, of a specified height and extent, and imposes penalties on non-compliance with its provisions.

The 42nd and 44th sections provide that the Railway Company shall not make any bridge over the navigation, and generally shall not interfere therewith, otherwise than as provided for by the act.

The 94th section empowers the Company, subject to the restrictions imposed by the act, to make and maintain the railway, and to construct in, under, upon, across or over any hills, valleys, roads, rivers, canals, brooks, or streams, or other waters, such embankments, bridges, aqueducts and conduits, either temporary or permanent, and to erect and construct such buildings, engines, machinery, apparatus and other works and conveniences for the purposes of the act as the Company shall think proper.

By an agreement made between the Navigation and Railway Companies, and afterwards embodied in an act of Parliament, the line of the railway was changed, by which change the navigation was crossed only once by the railway, and only one bridge required. The Railway Company had introduced into the above agreement a clause, enabling them to erect temporary bridges across the navigation, but which was struck out by the Navigation Company.

The Railway Company having commenced the building of the permanent bridge, erected a temporary bridge adjoining to the permanent bridge, which was used partly for building that bridge and partly for conveying earth and materials across the river. On the application of the Navigation Company an injunction was granted *ex parte*, restraining the erecting of a temporary bridge across the navigation, or of anything impeding the navigation in a manner not authorized by the act.

Affidavits were filed on both sides, and upon motion to dissolve the injunction:—*Held*, by *Alderson*, B., that subject to the restrictions of the act the 94th section ought to be liberally carried into effect.

That the Railway Company had the power of erecting such a temporary bridge, the power being exercised reasonably and *bonâ fide*.

That in construing such power, with a view to its reasonable and *bonâ fide* exercise, regard must be had to the peculiar purpose for which the permanent bridge was designed.

That the temporary bridge, being of the dimensions specified in the 34th section, and a navigable waterway being left as required by the 38th section, the same was lawfully erected under the 94th section, for the *bonâ fide* purpose of building the permanent bridge.

That the temporary bridge, being erected and used for a lawful purpose, might also be used for other purposes for which alone it could not have been erected.

That, subject to the restrictions of the act, the Company, acting *bonâ fide*, were constituted the judges of the mode of executing their works.

Circumstances upon which the Court was of opinion that the temporary bridge was reasonably and *bonâ fide* erected, and was unaffected by any circumstances connected with the above-mentioned agreement. As between the two Companies no costs were given, although an *ex parte* injunction was dissolved.

11 Will. 3, intituled, "an act for the making and keeping navigable the rivers Aire and Calder in the county of York," whereby certain persons, therein named, their heirs, assigns or nominees, were empowered, at their own costs and charges, to make navigable by barges, boats, lighters, and other vessels, the said rivers, within certain limits therein mentioned, and divers powers and authorities were thereby granted to such undertakers for the purposes of cleansing, opening, enlarging, or straightening, and making new cuts in the grounds adjoining the said rivers, and of removing all impediments to the navigation, and by the same act, in consideration of the expenses both of making and keeping navigable the said rivers, it was enacted, that it should be lawful for the undertakers, their heirs, executors, administrators, and assigns, and no others, from time to time, and at all times thereafter to take from all persons (conveying or receiving certain specified merchandize) rates and tolls as therein mentioned. That the undertakers accordingly improved the navigation of the rivers and received the tolls. [The bill then stated an act of Parliament of the 14 Geo. 3, for amending the last recited act, and a third act of the 1 Geo. 4, enabling the undertakers to sue and be sued by their clerk.] That under the powers and provisions of the said several acts, the undertakers from time to time at great expense improved the navigation of the rivers, and made several cuts and canals, and received the tolls thereby granted, and have ever since the act of Will. 3, been and still are the proprietors of the navigation; and, under the said several acts, are the proprietors of divers cuts and canals, and in particular of the part of the navigation in respect of which this suit is instituted.

The bill then stated the Manchester and Leeds Railway Act (*a*). That by the 3rd section of the act the Railway

(*a*) *Ante*, Vol. I, p. 575.

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Company are empowered to make the railway, with all proper works and conveniences connected therewith, in the line or course and upon, across, under or over the lands delineated in the plans, and described in the books of reference deposited as therein mentioned. That by the 6th section power is given to the Company to deviate from the line delineated in the said maps or plans, with a proviso that no such deviation shall extend to a greater distance than one hundred yards. That by the 34th section it is thus enacted, "Whereas the railway is intended to be carried over the river Calder at or near to a certain place called Broad Reach three several times, and again to cross the said river near to a place called Fairies' Hill, and also over a certain navigable cut or canal, lately excavated or made by the said undertakers at or near Fairies' Hill, and also over the line of a certain other projected cut or new channel for the river, at or near a certain other place called Woodnook, and it is expedient to make provision respecting the manner in which the railway shall cross the same several river, cuts or canals, and projected cut or new channel, and to provide for the free passage of water in and to the said river, cuts, and canals, and for the free access to and along the same, for the trade and merchandize thereof. Be it therefore enacted, that in carrying the railway over the river at the three several places, near Broad Reach, and again at Fairies' Hill, the Company shall and they are thereby required, at their own expense, under the inspection of the engineer of the said undertakers, and according to plans to be submitted to and approved by the respective engineers of the said undertakers and of the Railway Company, or their umpire, to make and execute at each of such crossings a good and substantial bridge of stone, brick, or iron, and of three arches, over the river, and the towing-path thereof respectively, with proper approaches thereto, and with perpendicular foundation walls to each bridge, and without

any projection under water; and the respective towing-paths thereof shall not be less than eight feet in width, and shall be carried under such of the arches of such respective bridges as the engineers of the said undertakers shall direct, and the breast wall of which towing-path shall be built perpendicularly from the foundation thereof, the underside of the opening at the key-stone of each of the arches of such several bridges not being less than thirty feet in height above the ordinary surface water level of the river at the respective places where such bridges shall be so erected, and the opening or span of each arch of such bridges not being less than fifty feet, and so as that the three arches of such bridge shall extend over and include the entire width of the river, and of the towing-path thereto belonging, at the respective places where such bridges shall be so erected; and certain directions were then given in the same clause as to the erection of the bridge at Fairies' Hill, and for deepening the waterway under the arches of all the said bridges to the depth of eight feet below the ordinary surface water of the navigation." That the 42nd section is in part as follows: "Provided always, and be it further enacted, that it shall not be lawful for the Railway Company to make any deviation or extension whatsoever from the course or direction, or to alter the line or level of the railway, as laid down in the plans, and intended to be made and constructed, where the same passes over the river Calder, cut, or canal, and projected new channel, save so far as may be necessary for crossing the river and navigation at the heights hereinbefore provided, nor shall the Company be authorized to make, erect, or set up any other bridges over, or tunnels, passages, culverts, drains or works under or upon the said rivers, cuts or canals, or either of them, other than such as hereinbefore required, or mentioned and provided for; nor shall it be lawful for the Company to take or use, or in any way damage the said rivers, cuts, canals, or other

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works of the undertakers, without consent in writing first had and obtained, other than and except in the manner hereinbefore expressly provided for and authorized: nor shall it be lawful for the Company to make such temporary use as is hereinafter mentioned of any lands, the property of the undertakers or other owners, lying at a greater distance than 250 yards from the railway." That the 44th section is as follows:—"And be it further enacted, that, save as hereinbefore mentioned and provided, nothing in this act contained shall diminish, alter, prejudice, affect or take away any of the rights, privileges, powers and authorities vested in the undertakers, or authorize or empower the Company to divert or alter the course of the said rivers, or of the cuts or canals, or the towing or foot paths thereto, or in any manner to obstruct the navigation of the said rivers, cuts or canals, or any of them, or to divert, intercept, cut off, take, use or diminish any of the waters therein, or any streams of water supplying the same, or any of them, or to raise or sink any of such rivers, cuts, canals or streams, or to hinder or obstruct the undertakers of the navigation of the said rivers Aire and Calder, at any time hereafter, and from time to time as and when they shall see occasion, from further enlarging or straightening the said rivers, or from making any such new cuts or channels, or making and completing the several cuts or canals, and other works and improvements to the navigation, by the several acts authorized to be made or executed, in the same manner and as fully in all respects as the said undertakers could have done had not this act been passed; provided the same shall not interfere with the construction of or prevent the free passage of passengers and goods along the railway for any longer time or in any other manner than shall be unavoidably necessary."

That the Railway Company did not for a long time after the passing of their first act, proceed to make their railway at or near Broad Reach, and in the beginning of

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1838 they applied to the undertakers, and requested them to permit the diversion of the course of the river Calder, in order, as the Company alleged, to obviate the necessity of building two of the three bridges near Broad Reach, and also to permit a deviation from the line as marked in the maps or plans.

That the undertakers declined to accede to such proposal upon the terms then proposed, whereupon the Company intimated that they should apply to Parliament to authorize such deviation.

That in the session of Parliament last past, the Company brought forward a bill to enable them to extend and vary their line, and, amongst other things, to enable them to avoid making three bridges at Broad Reach by slightly deviating the line of the railway, and altering the course of the river, and they proposed, after carrying the railway over the river by the Western bridge only, to make a new cut or channel joining the extremities of the bend over which the two other bridges were originally to have been made, so as to do away with that bend, and to make an almost strait channel for the navigation to the north of the line of railway. That the undertakers opposed the progress of the last-mentioned bill, and, finally, an agreement was come to between the Company and the undertakers, with the approbation of the committee sitting upon the bill, by which it was arranged, that certain clauses should be inserted in the bill for the protection of the undertakers and the navigation, and certain articles of agreement in writing were drawn up and executed, dated the 13th of May, 1839, and made between the Railway Company of the one part, and Sir J. Lowther and others, (in the bill named) trustees for and on behalf of the undertakers of the other part, to which articles the corporate seal of the Company was duly affixed, whereby it was agreed, that the opposition of the undertakers to the bill should cease, and that certain clauses should be inserted in the bill, and the Com-

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pany agreed, so soon as should be practicable after the passing of the bill, to purchase land, and deliver possession thereof to the undertakers, for the purposes of enabling them to make the new cut, and also to pay them, as and for the expenses of making the same, £12,000; and the undertakers agreed, upon being put into possession of such land, to make the new cut in manner in the agreement mentioned, and they further agreed to complete the same so far as was necessary to enable the Company to take possession of and to stop up the old channel within twelve months after receiving possession of the land, under penalties in the agreement detailed; and the undertakers agreed that the Company should, if they required it, have 30,000 cubic yards of the earth to be excavated out of the cut or diversion at nine pence per cubic yard, to be paid to the undertakers upon delivery of such earth by them upon some part of the intended railway embankment, to be fixed upon by the engineer of the Company as therein mentioned. And it was further agreed on the part of the undertakers, that, for putting an end to all disputes touching the line of the railway, they would, and they thereby did assent to a deviation to be made therein by the Company at and between the several places of crossing the river at Broad Reach, and that the Company might execute the same, either in the line marked out or at any distance south thereof; but, for the mutual protection of the several works, it was agreed that the embankment for the railway should not be brought nearer the proposed cut than the same was then staked out: and it was further agreed that the Western Bridge over the river near Broad Reach should be erected upon the site and in the direction proposed by the Company, and that the plans thereof, as last delivered to the engineer of the undertakers should be forthwith signed and approved of by him. That one of the plans referred to in the said agreement was a plan shewing the intended course of the railway at

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Broad Reach, and in which the points of intersection of the railway with the bend of the river, intended to be done away with as a navigable channel, are marked. That the plans for the Western bridge were, shortly after the date of the agreement, approved of and signed by the respective engineers of the undertakers and of the Company.

That, pending the negotiation which resulted in the agreement, the parties acting for the Company desired to insert a clause in such agreement, authorising the Company to erect temporary bridges over the river at Broad Reach, to facilitate the execution of their works, and in fact, caused a clause to be inserted in the draft of the agreement as follows:—"And it is hereby further agreed, and the parties hereto of the second part, do for themselves and the undertakers generally assent, that the Company shall be at liberty to make and use over and across the Calder, such temporary bridges as may be requisite or necessary for the formation of the embankment of the railway, in or upon the plan delineated on the plan hereto annexed." That the undertakers decidedly objected to any such clause being inserted in the agreement, and to any such power being given to the Company, and they insisted on such clause being struck out of the draft. That such clause was accordingly struck out, the undertakers objecting to enter into the agreement if it were inserted.

That clauses were also signed and approved by the respective solicitors of the Company and the undertakers, which were, in pursuance of the agreement, inserted in the bill then pending before Parialment, and the bill passed into a law, and is intituled, "An act for extending and altering a line of the Manchester and Leeds Railway, and for making branches therefrom, and for amending the acts relating thereto." That by the 86th section of the last-mentioned act, power is given to the Company to make an alteration in their line. That by the 87th section it is

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enacted, that all the powers of the Company to divert the course of the Calder, and for stopping the navigation thereof, save only so far as they relate to the purchase of lands for that purpose, should be suspended until the expiration of twelve months next after the undertakers shall have been put into possession by the Company of the land necessary for the purpose of making the deviation thereinafter provided for. That by the 88th section, the Company are directed to purchase and convey to the trustees of the navigation, the land necessary for making the diversion of the navigation. That by the 89th section, powers are given to the undertakers for the formation of the New Cut. That the 90th section of the act is as follows:—"Whereas the river Calder, near Broad Reach, pursues a circuitous course, and, by making the alteration in the course of the river hereby authorized, the navigable channel of the river will be rendered shorter and more direct, and made so as to avoid being crossed more than once by the railway, and it will not be necessary to erect the two most easterly bridges required by the first-recited (Railway) Act to be erected over the same. Be it therefore enacted, that in case the course of the river Calder shall be diverted under the powers hereinbefore contained, so as to prevent the navigation from being crossed more than once by the railway, then and in such case the Company shall not be required to make or construct more than one bridge over the Calder, at the place of crossing the same near Broad Reach, of such dimension and character, as by the first recited (Railway) Act is required, but shall be at liberty to make the railway upon an embankment, in and across the present channel of the river. Provided always, that notice of the commencement of any of the works connected with the navigation, or with the bridge, shall from time to time be given by the Company to the undertakers or their engineer, seven days, at least, before the commencement thereof. That by the

91st section, the same rights are reserved to the parties interested in the navigation in respect of the new cut, as existed in respect of the former channel. That by the 92nd section, the Company are directed to indemnify the undertakers against any assessments for rates in respect of the new cut. That by the 93rd section, it is provided that, save as respects the works by the last six preceding enactments authorized, nothing shall diminish, alter, prejudice, affect, or take away any of the rights, privileges, powers, or authorities vested in the undertakers, or affect the several clauses, provisions, and restrictions contained in the first recited (Railway) Act, for the protection of the navigation.

That the Company on the 1st of August, 1839, delivered to the undertakers the possession of the lands required for making the new cut, and the undertakers proceeded to excavate the same. That prior to the commencement of the work, a negotiation took place between the engineers of the Company and undertakers, touching the 30,000 cubic yards of earth, and any other earth which the latter might have to spare out of the new cut, and respecting the erection of temporary bridges over the river, but they were not able to agree thereupon.

[The bill then stated the fact of the delivery of 25,000 of the 30,000 cubic yards of earth as agreed upon, and a further negotiation for a supply of a further quantity of earth, and the supply of part thereof.]

That a further negotiation, embracing the subject of temporary bridges across the river, was attempted between the said respective engineers in December, 1839, but no agreement resulted therefrom.

That the Company have commenced, but have not yet completed the Western bridge over the river at Broad Reach. That the Company, notwithstanding that no agreement has been come to respecting the erection of a temporary bridge, have lately threatened to erect a tem-

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porary bridge over the Calder, about the point where they have begun to erect their westerly bridge at Broad Reach. That before the beginning of February, 1840, the engineer of the undertakers had only heard some general rumour of such intention, but on the 3rd of February, he saw near Broad Reach what he was informed was part of a temporary bridge. That on the 6th of February, the Company caused to be served at the office of the plaintiff the following notice:—

"To the undertakers of the Aire and Calder Navigation. Take notice, that the M. and L. Railway Company intend to commence at the end of seven days from the service hereof, the making and construction of a temporary wooden stage over and across the river Calder, adjoining or near to the bridge over the river at Broad Reach, now in the course of being made by the Company, and which stage will be used during the time of constructing such bridge, and which, with necessary and proper supports for the same, and for approaches thereto, will be so formed as to be suited to and used for the purpose of conveying such materials and other things across the river as may be necessary for the making of the railway, and the works connected therewith, as authorized to be made by the several acts of Parliament now in force with respect to such railway; and such temporary wooden stage will be so made and constructed, as to leave such water-way and and height over the river as are required by the said acts, or any of them. 5th February, 1840." That it appears by such notice, and is the fact, that the temporary stage or bridge is proposed to be erected for the purpose of conveying materials and other things across the river for making the railway and the works connected therewith. That the Company are not in any manner authorized to erect such temporary stage or bridge, and the same is not necessary for the erection of a permanent bridge, nor is it usual, nor is there any instance where such temporary

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bridge has been erected with reference to a permanent bridge, except where an existing road has been interfered with; that the plans signed by the engineers of the Company and the undertakers, as representing the exact manner in which the permanent bridge was and is intended to be built, do not shew any such temporary stage or bridge, or any indication whatever of an intention to erect such temporary stage or bridge; and had they done so, the engineer of the undertakers would not have agreed thereto. That the real object and intention of the Company in erecting the temporary stage or bridge, is not with reference to the execution of the permanent bridge, but for the purpose of carrying over earth for forming an embankment eastward thereof; that at present the Company have only erected the eastern abutments and eastern pier of the permanent bridge up to the springing of the arches, and the western abutment up to the level of the surface water, and the erection of the western pier thereof is not yet commenced; and, for the purpose of erecting the eastern pier, they have already laid from the abutment to the pier a platform of timber, for carrying over from such abutment the materials for the pier, without any objection on the part of the engineer of the undertakers, and hitherto the navigation of the river, although much interfered with by the depth of water being reduced by the Company, has remained open, so that vessels can pass along without lowering their masts. That such temporary bridge may be erected forthwith, and long before the permanent bridge, to be constructed according to the plans signed by the respective engineers, could be thrown over the river, whereby the navigation will be sooner and more seriously impeded than necessary. That the temporary bridge and the supports thereof will be highly prejudicial to the navigation and the towing-path, and will offer a considerable impediment to all vessels carrying masts. That the materials for the temporary bridge are

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already prepared near the site of the permanent bridge, and are capable of being put together in a very short space of time. That no plan or drawing of any sort of the temporary bridge has ever been submitted to the engineer of the undertakers, or approved of by him, and he therefore cannot say to what extent the temporary bridge, if erected, may affect the towing-path of the navigation, and therefore irreparable injury may ensue to the navigation, if the works shall be suffered to be executed without proper restrictions and control on the part of the undertakers.

The bill charged, that the plaintiff cannot obtain a full discovery of the matters aforesaid, unless the defendant Brackenbury, the clerk of the Railway Company, shall answer thereto on his oath.

The bill prayed, that the Railway Company, their workmen, servants, and agents may be restrained by &c., from erecting, or proceeding to erect upon or over the river Calder, at or near Broad Reach, the temporary stage or bridge which they have threatened in manner aforesaid to erect over the same; and from erecting or executing any temporary or other stage or bridge, or other works in or over the river Calder, which are not authorized to be erected or executed by the said acts of Parliament relating to the Manchester and Leeds Railway, or some or one of them, or in any manner, other than the manner authorized by the said acts of Parliament respectively; and also from impeding by any stage, bridge, or other works erected or to be erected by them, otherwise than as aforesaid, the free passage of any boat, barge, or other vessel with or without masts along the river Calder, at or near Broad Reach aforesaid, until the expiration of the time within which the New Cut ought to be completed by the said undertakers, under the last-mentioned act of Parliament, and the agreement in that behalf respectively set forth; and also after the expiration of that time from impeding in manner aforesaid

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the free passage of any such boat, barge, or other vessel aforesaid, along the river Calder near Broad Reach, and from the river into and along the said New Cut; the plaintiff thereby offering, on behalf of the undertakers, to fulfil in all respects the several agreements entered into by them and their engineer; and that the Railway Company may be directed to pay to the plaintiff, as such clerk of the undertakers as aforesaid, the costs incurred by the plaintiff in this suit, and for further relief.

Upon the above facts supported by affidavits, the plaintiff obtained, on an *ex parte* application to the Lord Chief Baron, an injunction in the terms of the prayer of the bill. The Railway Company gave notice of motion to dissolve the injunction, and supported the motion by affidavits. *12th Feb.*

The substance of the affidavits on behalf of the Company was, That the negotiation mentioned in the bill with respect to temporary bridges, was in regard to temporary bridges proposed to be erected at the two easterly crossings of the river, and not at the westerly crossing at Broad Reach. That the right to make temporary bridges during the construction of permanent bridges had frequently been asserted by the Company, and was expressly reserved, on the termination of the above-mentioned negotiation; that the temporary stage or bridge complained of was intended to be formed so as to leave a larger opening for a water-way than is required by the acts to be left during the construction of bridges. That the extreme ends of the temporary stage or bridge, in case it be placed alongside of the permanent bridge, will rest upon land the property of the Company. That the object and purpose of the Railway Company, in erecting such temporary stage or bridge in the manner intended (*a*), is to enable them to construct the

(*a*) The form and structure of the permanent bridge, and of the temporary stage, were shewn by a model exhibited to the Court.

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permanent bridge by carrying the stone and materials for building the arches and superstructure to their proper places. That the temporary bridge or stage is necessary, not only for the erection of the permanent bridge, but also for conveying earth and materials on the west side of the river, and placing the same on the east side, so as to form that portion of the railway embankment which will adjoin and rest against the eastern abutment of the bridge, and will form a necessary support to the bridge by its pressure against the eastern abutment, and will balance the pressure of the embankment against the western abutment, which balance of pressure is necessary to the true construction of the arches of the bridge.

With regard to the allegation in the bill, as to the erection of a temporary bridge being unusual in the practical course of building a permanent bridge,—

Mr. Burke, an engineer, in the employment of the Railway Company, deposed,—That in the years 1827 and 1828 he was one of the engineers employed by the government of Ireland to superintend the erection of three permanent stone bridges; two being over the river Lee, in the city of Cork, and the third over the river Bandon, in the county of Cork; and at each of such places a temporary bridge was erected during the construction of the permanent bridge: that, in his judgment, a bridge of the magnitude of the railway bridge cannot be erected without the proposed temporary bridge.

In answer to Mr. Burke, Mr. Leather and Mr. Macneil, two engineers, deposed, on behalf of the plaintiffs,—That they had had great experience in building bridges over navigable rivers, and of much greater magnitude than the intended railway bridge; and were enabled to state confidently, that a temporary bridge was unnecessary for the erection of the proposed permanent bridge. And Mr. Macneil suggested, that the object of the Company might be attained by placing a platform upon the piers and abut-

ments of the bridge, and working a moveable crane thereon; the width of which platform need not be greater than to enable the wheels of such crane to travel thereon. A somewhat similar mode of effectuating the same object was also suggested by Mr. Leather.

In answer to these last affidavits, Mr. Hughes, an engineer, deposed,—That he had read the affidavit of Macneil, and that, in his judgment, the moveable crane therein suggested would be insufficient, for the following, among other reasons,—that the deponent well remembered being engaged in superintending the building of a bridge over the river Ouse, when a platform, such as suggested by Macneil, had been laid down, the contractors for building the bridge, desirous of saving expense, not erecting in the first instance such a temporary stage as that proposed to be erected at the railway bridge. That it was found impracticable (without great loss of time and additional expense) to proceed without a temporary stage or bridge of the above description, and such temporary stage or bridge was accordingly erected before the bridge over that river was completed.

The following clauses of the Railway Acts are material in addition to those set forth in the bill:—

The 38th section, which provides, that the Railway Company shall, and requires them during the progress of constructing the bridges, (mentioned in the 34th section), or of the necessary repairs thereof respectively, or of the erection of any future bridges in lieu thereof respectively, from time to time and at all times to leave an open uninterrupted navigable water-way in the river Calder, of not less than thirty feet in width and twenty feet in height above the ordinary surface water thereof; and in the said cut or canal of not less than thirty feet in width and fifteen feet in height, together with a towing-path thereto respectively; and that the present towing-paths thereof respectively shall remain undisturbed until the new towing-

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path wall shall be erected, and the ground made good. And that, in case by reason of any accident, or in the execution of any of the works by this act authorized, or by reason of the bad state of repair of any part of such works, or of the said bridges, or either of them, or of any of the slopes, banks, or walls of the railway near the said rivers, the cuts, or canals, or either of them, or the towing-paths thereof respectively, or any part thereof, shall be so obstructed as that boats, barges, lighters, or other vessels navigating or using the same shall be impeded in their passage, or shall not be able at all times freely and uninterruptedly to pass along the same, or in case the navigable water-way, or towing-paths hereinbefore required to be preserved during the progress of the works, shall at any time be contracted to a less width than hereinbefore prescribed, then and in each and every such case [the clause then specified certain penalties to be paid by the Company to the undertakers].

The 94th sect. conferring on the Company, subject to the restrictions imposed by the act, the usual and necessary powers for making and maintaining the railway, and among other powers to make or construct in, under, upon, across or over any lands, hills, valleys, roads, rivers, canals, brooks or streams or other waters, such embankments, bridges, aqueducts, and conduits either temporary or permanent, and also to erect and construct such buildings, engines, machinery, apparatus, and other works and conveniences for the purposes of the act, as the Company should think proper [see this clause more fully set out, *ante*, Vol. 1, p. 576.]

Mr. *Simpkinson* and Mr. *Bacon*, in support of the motion to dissolve the injunction :—

Two material questions arise in this case.—First,—is the erection of a temporary bridge prohibited by any clause of the Railway Act; secondly, has the navigation been ob-

structed in a manner prohibited by the act. With regard to the first question—the 94th section—which it may be proper to remark is not mentioned in the bill, and was omitted to be stated to the Court at the time when the *ex parte* injunction was obtained, in the clearest language authorizes the unlimited construction of a bridge of this or of any other nature. As to this no doubt could be suggested, but the words of that section, "subject to the provisions and restrictions of the act," render it necessary to examine those clauses of the act which in any manner limit or restrict the powers conferred by the 94th section. The 34th and 42nd sections clearly relate only to permanent bridges, the 38th section only provides that a sufficient water-way shall be left;—this last clause raises the second question: it is not, however, in dispute, but that as respects the water-way the provisions of the 38th section have been complied with. The precise points involved in this case have already received a judicial construction by the present Lord Chancellor in a case as nearly as possible resembling this. See *The London and Birmingham Railway Company* v. *The Grand Junction Canal Company* (*a*). That case effectually sets at rest the only two material questions that arise.

Certain collateral objections are made;—first, it is said that the Company are precluded by the agreement of May, 1839, from asserting their powers of erecting temporary bridges; but that agreement, even if unexplained by the testimony on the part of the Company, would itself shew that it applies only to the two eastern bridges, the first design of erecting which had been abandoned, and an arrangement, ratified by the second Railway Act, come to, which, by placing in the hands of the undertakers that portion of the navigation which was to have been crossed by the two easterly bridges, would consequently disentitle

(*a*) *Ante*, Vol. 1, 224.

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the Company from erecting, at those parts of the navigation, any bridges, whether temporary or permanent, save by the consent of the undertakers.

It is further attempted to be argued, that even if the Company are empowered to erect this temporary bridge, for the purpose of building the permanent bridge, it can only be used for that strict literal purpose, and not for conveying across the river materials for the railway embankment; but it will scarcely be successfully contended, that if the temporary bridge is lawfully constructed for one of the purposes of the act, that it may not be used during the continuance of that lawful purpose for other purposes connected with the other works of the railway:—however, it is in evidence that the conveying of materials across the river is for supporting the permanent bridge, and consequently it falls strictly within such admitted lawful purpose.

With respect to the testimony and suggestions of Messrs. Macneil and Leather, were the balance between the theory of those two persons, and the statements of practical results by Mr. Burke and Mr. Hughes equal, it would be sufficient for the Company to say, as was said by the Lord Chancellor in the case before cited (*a*), that the act makes the Company the judges of the most convenient mode of conducting their works.

Mr. *Boteler*, Mr. *Stuart*, and Mr. *Wood*, contrà.—The first part of the argument on the part of the Company rests entirely on the case of the *London and Birmingham Railway Company* v. *The Grand Junction Canal Company;* but if that case is examined, it will be found to be an authority in favour of the plaintiff. The Lord Chancellor disapproved of the mode the Canal Company had taken to assert their rights, and therefore granted an injunction; but his Lordship took care to put the Railway Company

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under an undertaking not to interfere with the bed of the canal, or with the navigation, and expressed an opinion, that they would stand in some peril if they did so interfere. The defendants will clearly so interfere, for in addition to the piles driven in the bed of the river, all vessels will have to lower their masts.

The agreement of May, 1839, is in the most general terms, and is not confined to the eastern bridges; the intention of the undertakers is shewn by their refusal to entertain at all the question of temporary bridges; if the Company proposed to claim the right to make this bridge, it was a fraud on their part not to have so stated.

The notice of the 5th of February shews that the bridge is to be used for conveying materials for the embankment across the river, and not for the purpose of the permanent bridge; the reason alleged not being the *bonâ fide* reason, the building ought to be restrained by the Court, especially when two engineers depose that the object of the Company may be attained by other modes, which would not impede the navigation before the lawful impediment is erected.

The plan submitted to the engineer of the Company and agreed to by him, did not shew any temporary bridge, and therefore the 34th section of the act has not been complied with.

Mr. *Simpkinson* in reply.—The 38th section evidently contemplates the fact of some machinery being thrown across the whole bed of the river, during the erection and before the completion of permanent bridges, for it enacts that there shall be a water-way of a certain height left. It would have been quite nugatory to specify the height of the water-way to be left during the progress of building the bridge, if there was to be no erection over the navigation other than the permanent bridge. The modes suggested by Messrs. Macneil and Leather would actually be an

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interference with the navigation within the 38th section, for a height of twenty feet could not be left by a scaffold from one pier of the bridge to the other. With respect to the plan of the bridge agreed to by the engineer of the undertakers not shewing the temporary bridge, the plan would, according to custom, shew the bridge as completed; a plan of a house does not shew the scaffolding to be used in building it.

ALDERSON, B.—I do not feel it necessary to take time for the consideration of my judgment, because I entertain a strong opinion upon the point. It appears that under the 3rd section of the act of Parliament, the Railway Company have the power of doing all works which are necessary for completing the railway; and the 94th section, which, inasmuch as it incorporates in itself the restrictions and provisions previously made in the act, should, I think, be considered as one of the earlier sections, may be very naturally adverted to in the first instance, for the purpose of seeing what were the powers and the nature of the powers which the Company had, of carrying into effect the different works which they had to perform. The 94th section gives the power of entering upon lands, "under the provisions and subject to the restrictions of the act," and of making a variety of works, amongst which are clearly included embankments, bridges, and so on, either temporary or permanent, and for the purpose of constructing those, to do such works as they shall think proper, and to alter the course of any rivers, canals, or brooks. Therefore, the Company have a discretionary power given to them; a discretion, as said by the Lord Chancellor in the case cited (*a*), not arbitrary, but to be exercised reasonably and *bonâ fide*, of doing such works in such a manner as

(*a*) *London and Birmingham Railway Co.* v. *The Grand Junction Canal Co.*, *ante*, Vol. 1, 224.

reasonable, careful, and skilful men would judge expedient and fit. This therefore they might do in building this bridge; and it must be borne in mind, that this is a railway bridge, and must be constructed in such a manner and with such apparatus as a railway bridge would require. Now, when it is seen that, where this bridge is to be built, there is an embankment on the one side and on the other, it is not an unnatural thing for the Railway Company, in constructing the bridge, to use such an apparatus as might be useful for the double purpose of making the embankment at each end, as well as the bridge itself; and when this Court has to consider what this Company have on the present occasion done in the exercise of a *bonâ fide* discretion entrusted to them, it ought not to confound bridges erected over rivers, where they communicate with ordinary highways, with bridges, the essential quality of which is, that they shall be level, and shall have an embankment of equal height with the crown of the bridge, at each end of it.

Now these provisions are found in the 94th section; and that section subjects those provisions to restrictions previously contained in the act: if, therefore, the restrictions previously found in the act are such as to prohibit the work in question, why then this injunction clearly ought to be continued; but, subject to that, and, in so far as there are no restrictions, the provisions of the 94th section ought to be reasonably and liberally carried into effect. What, then, are the previous restrictions introduced for the special protection of the Aire and Calder Navigation Company? The first to which it is material to advert is in the 34th section, which says, that, in crossing the river Calder, (I confine myself to the bridge in question), the Railway Company are not to cross at their free discretion by any bridge which may be most convenient for the purpose of the railway, but they are bound to make a bridge of such dimensions as shall in no way, beyond

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beyond the intention of the Legislature, impede the navigation, which, to a certain degree, must be obstructed by the mere circumstance of the bridge being cast over it: therefore the act prescribes that bridges shall have a particular construction,—in fact, leaving the water-way complete. That was the mode in which this bridge was to be constructed; further, there was to be a towing-path of a given width. This section might very well stand with the 94th section; for, although the bridge is to be of particular dimensions, the mode of constructing it, and the apparatus whereby the construction should be effected, are to be left within the discretion of the Company, which would be guided not merely by the circumstance that this was a bridge of given dimensions crossing the Calder, but that it was a bridge of those dimensions, united with an embankment on either side, which embankment was to form part of the railway. There is nothing inconsistent in that; and the 94th may very well stand with the 34th section, and may give to the Railway Company a reasonable discretionary power, to be carefully exercised, of erecting a temporary stage of the dimensions in question, for the purpose of erecting the permanent bridge. The next restriction is imposed by the 38th section. It occurred to the Legislature, that, although the undertaking would eventually have this large water-way, still, that in the progress of making the bridge, there would be a considerable obstruction—arising temporarily, it is true, but yet very inconveniently—to this navigation, which is one of very considerable extent: the Legislature therefore determined that there should only be a limited obstruction even during the temporary period of making the bridge; besides this, there was the further necessary inconvenience which must occur during the progress of constructing the bridge. Every person is aware that a bridge cannot be properly built, in fact, built at all, without centres being erected for the purpose of temporarily supporting the

stones before the key-stone is put to support the arch; and, as the width and height of the water-way is described by the 34th section, it occurred to the Legislature, that, inasmuch as the centres must be erected during the progress of the bridge, it would not be possible to have so high a water-way as they were ultimately to have in the finished perfect state of the bridge, and that possibly the centres might, unless some restrictions were imposed, be brought down so low, as very materially, if not altogether, to impede the navigation during the time the bridge was in progress of construction; and, therefore, to remedy the further inconvenience during that temporary period, the 38th section provides, that a certain specified uninterrupted navigable water-way should be left, of not less than thirty feet in height: whereas, when complete, and the centres taken away, each arch would be fifty feet in height above the ordinary surface of the water. With the exception of the 34th and 38th sections, there are no clauses material to be adverted to as regards the construction of the bridge. Now, if the Company are required to leave a certain width and a certain height, they impliedly have the right of obstructing the navigation, provided they comply with these requisites; and the substance of the two sections is, that the Company may construct in a particular manner bridges across the Calder of given dimensions, and that in the progress of construction they may obstruct the river, provided they leave a specified extent of water-way.

Then come the 42nd and 44th sections; these go to prohibit the doing anything to the damage or obstruction of the navigation, except as thereinbefore provided, that is to say, except to the extent and during the time provided for by the 38th section. Therefore if, on the part of the plaintiffs, it can be shewn that this temporary bridge is not erected for the purpose of the permanent bridge under the provisions of the 34th section, or, if it is so constructed

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as to encroach on the towing-path or obstruct the water-way, it would be a case which, although independent of these sections, might have been authorized by the 94th section, cannot, construing the 94th in conjunction with these sections, be permitted to be erected. Now it seems to me that this bridge, if it fall within all the previous conditions; if it be constructed for the purpose of making the permanent bridge; if it be constructed so as to leave an uninterrupted water-way to the extent provided by the 88th section; if it does not encroach on the towing-path; if all these circumstances concur; then the only remaining question is, whether the temporary bridge being used not merely for the purpose of the permanent bridge, but also for some other purpose for which alone it would not have been competent to construct it,—whether that will make any difference on the present occasion (*a*)? I agree, also, that if the further use of the bridge or apparatus in question made it more inconvenient to the Navigation Company than if used for the one only legitimate purpose, then it would be proper for this Court to prevent the extended use.

These being the principles upon which, as it seems to me, this question is to depend, I must look at the facts of the case, and see whether there is anything in the affidavits which can lead to the conclusion that this bridge is improperly constructed, and whether the use of it, for the purpose of conveying materials, is one which has any effect on the navigation. Now it appears beyond all doubt on the affidavits that this temporary stage or bridge is constructed and used for carrying materials from the Park Hill works, in order to increase the embankment on the easterly side of the bridge: according to Mr. Burke's affidavit, it is to be used both for that purpose and for con-

(*a*) See *Webb* v. *The Manchester and Leeds Railway Co.*, *ante*, Vol. 1, p. 576.

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structing the permanent bridge; and his affidavit appears to me to be very material, because he says,—"that it is the way in which the Railway Company have constructed bridges in other places in other parts of the river." In those cases there was no such object as is now asserted to be, a *malâ fide* object;—in those cases no such assertion was made, and yet the construction of those bridges was accomplished in the same manner as now proposed to be adopted; and I own that the circumstance that this is not now done for the first time, but has been done at several times and on several occasions, when no such reasons existed as exist on the present occasion, goes strongly to shew that it is a *bonâ fide* erection for both purposes.

It is said there are circumstances connected with the negotiation between the parties, which shew that it is not probable that the Railway Company have *bonâ fide* any such intention; and the negotiation, which took place when the last of the railway acts was obtained, is relied on. That ended in an agreement, the terms of which, beyond all doubt, have been properly carried out, but it is suggested that in that agreement there was sought to be introduced a clause, enabling the Railway Company to erect temporary bridges for the purpose of making embankments. I do not say that it is necessarily confined to embankments for the two easterly bridges, but, treating it as general, that it was for the purpose of embankments, I apprehend, that, according to the construction I have put upon this act, it is not lawful for the Railway Company to erect any temporary bridge over the Calder, so as to interfere with the navigation, for the mere purpose of conveying materials to make an embankment, if in so doing they in any way obstruct the navigation; and in that respect this case differs from the case cited, where the present Lord Chancellor held that the Railway Company had a right to make a temporary bridge across a canal. But he so held, as it seems to me, on the condition that

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the Railway Company should carry it over without obstructing the navigation at all, and therefore, in this case, inasmuch as the Navigation Company have obtained a clause generally requiring the Railway Company not to obstruct their navigation, save so far as permitted, and inasmuch as the previous permission extends only to the making of the bridge over this place, it seems to me that the Railway Company have no right to make any bridge obstructing the navigation for any purposes other than those provided for, and therefore that the clause in question was very properly excluded from the agreement. This circumstance, however, does not at all affect the present question, which really turns upon the power the Company have of making and continuing the temporary bridge during the *bonâ fide* progress of the permanent bridge, and of using it for any purpose not more injurious to the navigation than if such purpose did not exist. I do not think that the excluded clause materially affects the question, neither do I think that the affidavits on the part of the undertakers alter it. They do not advert in particular to the circumstance of its being a railway bridge,—they speak of bridges generally, and I think that is a very limited and unsatisfactory view of the mode of constructing railway bridges. Every thing should be taken for the purpose for which it is constructed, and the mode of construction might always reasonably depend upon that view. I have come to the conclusion upon these affidavits, that this bridge is reasonably and *bonâ fide* constructed for the double purpose: then does the fact of the purpose being double alter the case? If that double purpose produces a greater obstruction to the navigation, it cannot be continued longer than required for the single purpose. The notice (5th of February) states that this stage is to be continued "during the progress and erection of the permanent bridge." Therefore if the Company continue it after the permanent bridge is finished, or if they go on *malâ fide*,

and do not exercise due diligence in the erection of the permanent bridge, they will incur some risk. Mr. Burke's affidavit states that this temporary stage will not be an additional obstruction to the navigation, but will positively be otherwise, for he says, that the effect will be to enable the permanent bridge to be erected within a shorter time. The stage itself must be taken away the moment the permanent bridge is completed; the shorter the time the permanent bridge is in erection, the shorter will be the period of time during which the temporary obstruction will continue to the navigation.

I therefore come to the conclusion, not only that the construction and use of the temporary bridge will materially advantage the Navigation Company, and that without it they might be subjected to a longer period of inconvenience. Then, what further obstruction will the carrying over additional barrowsfull of earth cause? Will they cause larger or heavier piles to be driven in the river? I have no evidence of that. Will they cause the longer continuance of these piles? Manifestly not; because these cannot be continued after the permanent bridge is completed. If the Company act *malâ fide*, that will be a sufficient ground for an application to this Court.

Upon the whole case, therefore, it seems to me that this is a purpose of construction allowed by the 94th section, and not prohibited by the 42nd or 44th sections, and is within the exceptions of the 34th and 38th sections. I think the injunction should be dissolved; but the case being between two companies, I shall say nothing about the costs. I think however the Company should undertake to make the bridge or stage according to the model I now see before me.

Between E. G. BARNARD, W. HARRISON, J. F. HARRISON, T. BARNARD, and others, on behalf of themselves and all other the proprietors or holders of shares in the Capital of a certain Society or Company, associated in copartnership together, under the name of "THE STANHOPE and TYNE RAILROAD COMPANY, - - - - - - - - *Plaintiffs*;

and

W. WALLIS, MARIA his WIFE, and others, *Defendants*.

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Aug. 2nd, 3rd. Nov. 15th, 16th.

The defendant and his family were lessees under the Dean and Chapter of Durham,

THE bill, as amended, stated, that before and in November, 1831, C. Rippon was possessed of quarries of limestone of a close of land, situate near S. Shields, called "The Deeps," there being reserved to the lessors all mines and minerals, and the liberty of getting and carrying away the same, and all powers of entry for that purpose, and particularly of laying, making, and granting waggon-ways over the premises, paying reasonable damage.

The defendant had originated a project of a public railway for carrying mineral produce and millstones from S. to M. (the terminus M. being distant nineteen miles from S. Shields), and had associated with himself certain coadventurers: he subsequently retired from the concern for a pecuniary consideration paid by his coadventurers, and he undertook to assist them in carrying out their project.

Subsequently to the retirement of the defendant, the coadventurers adopted the style of the S. & T. Railroad Company, and they extended the project from M. to S. Shields, and, having obtained from the Dean and Chapter a grant of their reserved rights, completed a public railway, with a double line of rails, for general purposes, which passed through "The Deeps."

The defendant brought an action of trespass against the Company, on the ground that the reservation in his lease did not authorize the lessors or their grantees to make a public railway for general purposes. The Company pleaded (among other pleas) leave and license by the Dean and Chapter, and also by the plaintiff.

The Company filed their bill, and, besides the grounds taken by their pleas, insisted that the defendant had full notice of the extended project at the time of his retiring, and of his making the agreement: that he had full knowledge of the works and intentions of the Company whilst the railway was in progress; and having permitted the Company to expend money thereon, was precluded in equity from asserting his legal rights, if any. The common injunction was obtained on default of answer.

The defendants on putting in their answer obtained the order nisi for dissolving the injunction, which, on cause shewn on the merits, was continued by the Master of the Rolls:—*Held*, by the Lord Chancellor, that three questions were involved:—

1st. The extent of the reservation to the lessors.

2nd. The construction of the agreement of the defendant.

3rd. Whether there were equitable circumstances debarring the defendant from asserting his legal rights.

That the two first questions were purely questions of law, and if either of them were decided in favour of the Company there would be no question for equity.

That the third question was one which could not properly be decided on an interlocutory application.

That the action at law ought to proceed, with liberty to the Company to apply, if both the two first questions were decided against them, in which event, the damages to the lessee by reason of the railway, would be estimated by a jury.

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at Stanhope, in the county of Durham; and that the defendant, W. Wallis, in the same month, proposed to Rippon to form a Company to work such quarries, and also coal mines in the neighbourhood, and to form a public railroad from Stanhope to Medomsley, in the same county, for conveying the produce of the quarries and mines, and also other goods and merchandize, and for such other purposes as a railroad is generally used for; and to sell such lime and coal. That Rippon approved of such proposal, and consented to become a partner in the projected Company; and that the defendant, W. Wallis, in November, 1831, communicated the proposal to the plaintiff, W. Harrison, who also consented to become a partner; and it was agreed between the defendant, W. Wallis, Rippon, and the plaintiff, W. Harrison, that the defendant, W. Wallis, should secure for the projected Company certain coal seams in the parish of Lanchester, in the county of Durham, belonging to one J. Selby; and accordingly the defendant, W. Wallis, entered into an agreement, in writing, with Selby, dated the 30th of November, 1831, whereby Selby agreed to let to Wallis, and such partners as might join him in the projected railway, certain seams of coals, at the rent of £150 per annum, and also waggon way-leaves for coal, lime, and other goods.

That coal and lime were the principal articles by the carriage of which the defendant, W. Wallis, Rippon, and the plaintiff, W. Harrison, expected to derive profit; but from the beginning of the project it was proposed and agreed, and fully understood between them, that the railway should be used not only for the carriage of coal and lime, but also of other goods and merchandize, and for any purposes for which a railway could be profitably and advantageously used; and the defendant, Wallis, in November, 1831, represented to the plaintiff, W. Harrison, that the Dean and Chapter of Durham had power to grant way-leaves for making railroads over their lands let on lease,

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not only for the conveyance of coal and lime and other minerals, but also for the carriage of any other goods, and for any purposes for which railroads are used.

That the defendant Wallis, on the 1st of December, 1831, with the sanction and approval of Rippon, and of the plaintiff, W. Harrison, applied, by letter, to the agent of the Dean and Chapter for a way-leave, for general purposes, to be granted to the proposed Company, through lands between Stanhope and Medomsley; such letter being partly as follows :—

"Since I saw you on the subject of a railroad from Stanhope to Lanchester, I have the pleasure to say, that it has so far succeeded that I am authorized to obtain way-leaves from the different proprietors, some of whom, as well as myself, seeing the advantage to be derived from the facility of obtaining lime and coal, have given a permanent right of way without remuneration. It is probable that the road will go through M common; and I will thank you to obtain leave from the Dean and Chapter, and the terms on which they will grant it. As it is the intention to avoid the expense of an act of Parliament, the parties must be protected by a permanent right of way for general purposes."

That an agreement in writing, dated the 2nd of December, 1831, was made between Rippon, the defendant W. Wallis, and the plaintiff W. Harrison, whereby they agreed to form a railway from Stanhope to Medomsley, and to ake a lease of limestone quarries of Rippon, and of parts of a coal field in the neighbourhood of Medomsley; and that the undertaking should be divided into four shares, and that each of them should hold one share; and that a fourth partner should be admitted on condition of providing sufficient capital for the undertaking. That thereupon the plaintiff, E. Barnard, was admitted a partner in the undertaking.

That in December, 1831, the plaintiff, W. Harrison, proposed to the then other partners, that the projected railway should not only be made from Stanhope to Medoms-

ley, being a distance of fifteen miles, but should be extended to the river Tyne; and that the terminus should be at some point below Newcastle bridge, either about a mile from South Shields or at South Shields; and that such terminus should be fixed when, and providing an eligible waterside, and the requisite way-leaves through the lands of other persons, besides the lands of the Dean and Chapter, should have been secured.

That South Shields is distant from Medomsley nineteen miles. That the defendant W. Wallis made no objection to the proposal, but acquiesced therein; and from thenceforward all the proceedings of the partnership were prosecuted, with the view to make a public railroad to the Tyne, and to carry along the same lime, coal, and other goods and merchandize, and to use the same for any of such purposes as a public railroad is generally applied to.

That on the 9th of December, 1831, the plaintiff, W. Harrison, on behalf of the partnership, prepared certain instructions for Mr. R. Bowlby, the solicitor of the partnership, to enable him to obtain from the Dean and Chapter way-leaves for all purposes through their lands, which instructions were approved of by the defendant W. Wallis, and were as follow:—

"Mr. Bowlby, on behalf of the proposed Stanhope Railway Company, will take the necessary steps to obtain the requisite way-leaves from the Dean and Chapter. As the principle article is lime, it is impossible to define how the road may branch out; let it therefore be expressed in general terms for the county of Durham. From the advantages this line will afford to the agricultural interest in its vicinity, it is expected that every facility will be given to it, as the outlay will be extremely heavy: the transit of any and all articles must be included in the way-leaves, and consent given for obtaining an act of Parliament, if deemed advisable."

That, on the 10th of January, 1832, instructions were, with the privity of the defendant, W. Wallis, given to

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Mr. Bowlby, by the plaintiff, W. Harrison, to prepare a deed of partnership; which instructions were (amongst other things), to prepare a draft deed of partnership under the firm of "The Stanhope and Tyne Railroad Company," say railroad from Stanhope to the neighbourhood of Medomsley, with branches.

That Rippon became dissatisfied because the undertaking was to be extended to the Tyne, and withdrew from the same on the 10th of February, 1832, and consequently the intended deed was not prepared.

That the Dean and Chapter always make their agreements for grants of way-leaves verbally, and never in writing, and such verbal agreements are always strictly observed and performed by them; and, accordingly, Mr. Bowlby, on the 4th of February, 1832, entered into a verbal agreement with the agent of the Dean and Chapter for a way-leave from Stanhope to Medomsley, and treated with him for way-leaves from Medomsley to the Tyne. That, on the 30th of March, 1832, the defendant W. Wallis entered into the following agreement with the other partners:— "Messrs. Harrison & Co. propose to give Mr. Wallis, who agrees to accept, as a bonus for rescinding the agreement of the 2nd of December, 1831, respecting a railway from Stanhope to Medomsley, and the taking of Mr. Rippon's limestone, the sum of £3000 (*a*), payable by instalments after the formation of a railway for the conveyance of Mr. Rippon's limestone from Stanhope to Medomsley and elsewhere, and the leading of lime along the railway. And Mr. Wallis agrees to aid and assist as far as he can Messrs. Harrison and Co. in the accomplishment of their object, they defraying any expense he may incur; and they agree, should they abandon the project, to give Mr. Wallis the good-will of the project as far as they can." That the sum of £2000 was subsequently paid, and a release for the same

(*a*) Subsequently reduced by agreement to £2000.

executed by the defendant Wallis. [The bill then stated the formation of the Society or Company, called "The Stanhope and Tyne Railroad Company;" the indenture of settlement for the regulation thereof; and the appointment of the plaintiffs as directors and trustees.] That in the years 1832 and 1833 the plaintiffs, as trustees of the Company, entered into several agreements with landowners for obtaining way-leaves. That the intended railroad passed through lands situate at Westoe in the county of Durham, belonging to the Dean and Chapter, and part of the lands necessary to form the communication of the railroad with the Tyne consisted of a close of land at Westoe called "The Deeps," extending in width 323 yards, at the distance of one mile from the termination of the railroad at the Tyne. That on the 21st of September, 1832, Mr. Bowlby, on behalf of the plaintiffs, entered into a verbal agreement with the Dean and Chapter for a grant by way of lease for twenty-one years of the right and liberty of way-leave, and to make the railroad over their lands, including "The Deeps," upon the terms mentioned in an indenture of the 26th of October, 1833, at the yearly rent of £200 per mile, amounting in the whole to £510 per annum. That in pursuance of the agreement the plaintiffs and their workmen, with the privity and consent of the Dean and Chapter, entered upon the lands including "The Deeps," and staked out the same, and in April, 1833, the line of railway through "The Deeps," being a double line of rails, was separated and railed off from the rest of the close. That the plaintiffs have lately discovered that a lease of a farm, of which the close called "The Deeps" forms a part, had been formerly granted by the Dean and Chapter to a Mr. W. Marshall, deceased, and they have also discovered, and the fact is, that the said W. Marshall by his will devised the same. [The bill stated the effect of this will, giving and devising the lease and the right of renewal thereof, for the use and benefit of his daughter,

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Maria, the wife of the defendant W. Wallis, for life for her separate use, and after her death for her children, and in default of such children for the benefit of the defendant W. Wallis absolutely; and stated the death of W. Marshall, on the 6th of March, 1821.] The bill then stated a renewal of the lease of the farm including "The Deeps," on the 30th of July, 1831, with the customary reservation therein to the Dean and Chapter of all woods, underwoods, and trees, and all mines, quarries, and seams of clay, with full and free authority and power to cut down, take, dig, win, work, get, and carry away the same, with free ingress, egress, and regress, way-leave and passage to and from the same, or to or from any other mines, quarries, seams of clay, lands, and grounds, on foot, and on horseback, and with carts, and all manner of carriages, and also all necessary and convenient ways, passage, conveniences, privileges, and powers whatsoever for the purposes aforesaid; and particularly of laying, making, and granting waggon-ways in and over the premises, or any part thereof, paying reasonable damage for spoil of ground.

That, in pursuance of the verbal agreement between Mr. Bowlby and the Dean and Chapter, an indenture of lease, dated the 26th of October, 1833, was made and executed between the Dean and Chapter, and certain other necessary parties, and the plaintiffs; whereby the Dean and Chapter, for themselves and their successors, but so far only as they could or lawfully might, and not further or otherwise, and the said other parties demised to the plaintiffs and their workmen full and free liberty and power to enter into and upon any lands (among others) in the parish of Westoe, and to form, make, and maintain thereon one main road or way, with a bye or side way, not exceeding in breadth fourteen yards, except where cuts, bridges, toll-houses, engines, or other erections should be required, and also full power and authority to use such main road and side way for the conveyance of coal, lime, manufac-

tured goods, or any other substances, goods, or merchandize whatsoever, so as that only one main road and side way should be used at one time; yielding and paying, &c.

That ever since April, 1833, the plaintiffs have been in possession of that part of "The Deeps" which was railed off as aforesaid. That the main road and side way was completed over "The Deeps" before September, 1834, and the whole of the railroad from Stanhope to the Tyne was completed and brought into full use as a public railroad on the 10th of September, 1834; and ever since the completion thereof the plaintiffs have used the same for the conveyance of coal, lime, manufactured and other goods and merchandize. That it was well known in the neighbourhood of Westoe before the line through "The Deeps" was staked off, that the Company were making a public railroad in the direction of the Tyne, and the defendant W. Wallis resided at Westoe, at the distance of a quarter of a mile from "The Deeps," and was well aware that the Company were forming a double line of railroad over the same, and that the Company were expending large sums of money in the making of the same, but he never objected to the works. That the defendant W. Wallis, during the progress of the works, conversed with the workmen, and was informed by them, and also saw, that a double line of railway had been staked off, and he never objected thereto; and had he objected, the Company would have desisted in their works, and by doing so would have saved an outlay of £100,000. That the defendant W. Wallis, in November, 1839, commenced an action of trespass against the plaintiffs, and by his declaration in the action, complained of injury and trespass done to "The Deeps." That the plaintiffs had pleaded to the action.

The bill charged, that it was contemplated by Rippon, the defendant W. Wallis, and the plaintiff W. Harrison, that the railway should be used for all purposes to which a

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public railway was applicable, and that the defendant W. Wallis was well aware in November and December, 1831, and in January and February, 1832, that it was the object and intention of the plaintiff W. Harrison to extend the railroad to the Tyne. That the sum of £2000 was given to the defendant W. Wallis for his goodwill in the concern, upon the understanding that the railroad would be extended to the Tyne. That the plaintiff W. Harrison sent the following letter to the defendant Wallis on the 11th of December, 1831:—"You need not trouble yourself on the subject of way-leaves, as we can go to the Derwent in our own right from Medomsley; consequently our junction with the Carlisle and Gateshead road is at our own option, and will stand as a forcible argument for our splendid line to the Tyne." That by the words "our splendid line to the Tyne," the plaintiff W. Harrison meant, and the defendant W. Wallis understood, a railroad from Medomsley to the Tyne at South Shields; that the defendant W. Wallis, in a letter to Mr. Bowlby, dated the 24th of January, 1832, stated, with reference to the proposed railway, that "the continuation thereof to the Tyne is Mr. Harrison's project." That the defendant W. Wallis, in a letter to the plaintiff W. Harrison, dated the 10th of December, 1831, stated as follows: "I fear a single line of way will not afford sufficient accommodation for the immense quantity of carriage during the lime season." And in the same letter, "I am glad Mr. Bowlby's ideas coincide with what I stated, namely, to commence operations with Selby's coal: the public will then believe that we do not intend to go further, and will not attend to any reports of our ulterior object, should it unfortunately transpire." That the defendant W. Wallis alleges, that, on the 11th of February, 1834, he wrote and sent to the Dean and Chapter a letter as follows:—"A most unnecessary trespass and waste is now being committed in a field leased under you. I applied to Mr. Stoddart, who informs me

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that it is the act of persons calling themselves the Stanhope and Tyne Railway Company, who do it under your sanction. I cannot have the least objection to your exercising or deputing the rights you possess; but the parties in question have exercised the privilege in the following manner" [the particular mode was detailed].

That if the defendants had any right to prevent the plaintiffs from making a public railroad over "The Deeps," but which, by reason of the agreement of the 30th of March, 1832, they had not, yet by permitting the plaintiffs to make a double line of railway, and to expend large sums of money, without asserting their title, they ought not to be allowed to disturb the plaintiffs' title. The bill prayed that it may be declared that the plaintiffs, as trustees for and on behalf of the Stanhope and Tyne Railway Company, are entitled to retain possession of, and to enjoy and use the line of railroad through the close of land called "The Deeps," for the residue now to come and unexpired of the term of twenty-one years, in the indenture of the 26th of October, 1833, mentioned, and intended to be thereby granted and demised by the Dean and Chapter of Durham to the plaintiffs, or at least for the residue of the term granted to the defendants by the indenture of the 20th of July, 1831, as a public railroad for the conveyance of coal, lime, manufactured goods and passengers, without being subject to any interruption in the enjoyment of the railroad by the defendants, or by any person or persons claiming under the lease of the 20th of July, 1821, but subject to the payment of the rents reserved by the indenture of the 26th of October, 1833, and that the defendants, their solicitors and agents, may be restrained from proceeding in the action at law against the plaintiffs, and from commencing or prosecuting any other proceeding at law against the plaintiffs, or any of them, relating to the matters aforesaid, or any of them, and for further relief.

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The plaintiffs, on default of answer, obtained the common injunction, restraining the action.

The joint and several answers of the defendants W. Wallis, Maria his wife, and their children, to the above bill, in substance stated—That in the year 1831 it had occurred to the defendant W. Wallis that it would be convenient to set on foot a subscription among the landowners in the neighbourhood of Lanchester and Stanhope, for the purpose of conveying lime from Stanhope to Lanchester, and coal from Lanchester to Stanhope, and that he proposed to Mr. Rippon to make a public railroad for those purposes, and that it was agreed between them that such railroad should terminate at Medomsley, but that the defendant W. Wallis never proposed to form a public railroad from Stanhope to Medomsley, for conveying other goods or merchandize, but only, that besides the carriage of coal and lime, Rippon had suggested to the defendant W. Wallis that lead and millstones might be advantageously carried along the railway. That in his the defendant W. Wallis's application to the agent of the Dean and Chapter for way-leaves, he may have used the expression "general purposes," but that if he did so, it was with reference to the intention of using the railway for such particulars as aforesaid, as contradistinguished from the carriage of coal and minerals only. That the defendant W. Wallis had not in November, 1831, or at any other time, represented to the plaintiff W. Harrison, or induced him to believe, that in all cases where the Dean and Chapter had power to grant a right to make a railroad for the carriage of lime and coals, they had also the right to authorize the use thereof for every other purpose, for that the railroad to which the defendant W. Wallis referred was only intended to pass through open and uninclosed commons and moorlands, not demised to a lessee, through which the Dean and Chapter have a right to make and authorize any other persons to make railroads for general purposes. That on one occasion Rippon suggested

the idea of carrying the railroad to the Tyne, by a line which had been formerly attempted, on the bank of the river Derwent, to a place called Dunstan Hill, near the mouth of the Derwent, and seventeen miles distant from South Shields, and that the plaintiff W. Harrison afterwards at different times alluded to the possibility of carrying such a scheme into effect; but that the idea of carrying the line to the Tyne was never seriously entertained, so long as the defendant W. Wallis was interested in the partnership, during the whole of which time the project was confined to making a railway from Stanhope to Medomsley; and that he always refused to listen to any plan for carrying the railway further than Medomsley, and that the plan which has since been adopted for continuing the railway from Medomsley to the Tyne at South Shields was not so much as thought of until some time after the defendant W. Wallis had retired from the partnership: that the line from Medomsley to Dunstan Hill would have been entirely different to the line from Medomsley to South Shields: that Medomsley is distant from Stanhope eleven miles, and from South Shields twenty-two miles.

That Bowlby was never instructed to obtain from the Dean and Chapter way-leaves for all purposes generally, through any of their lands in the county of Durham; for that the only object in contemplation when the instructions to Bowlby were given, was to obtain way-leaves for a railway from Stanhope to Medomsley; and that if any other instructions were given to Bowlby, the same were not prepared by or with the privity or knowledge of the defendant W. Wallis.

That a meeting took place on the 2nd of March, 1832, between the defendant W. Wallis and the plaintiffs W. and J. Harrison, on which occasion it was stated by those plaintiffs that the capital necessary for completing the railroad would be £40,000, and thereupon a memorandum was signed by those parties, partly as follows:—"2nd of

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March, 1832. The sum required is £40,000, to make the railroad from Stanhope to Medomsley."

That on the 24th of April, 1832, the defendant W. Wallis received a letter from Bowlby, on the subject of the £3000, then secured to the defendant W. Wallis, in which he says, "It appears the parties want extended way-leaves."

That the plaintiffs did not in the years 1831 and 1832, or at any time so long as the defendant W. Wallis was connected with them in the undertaking, project the formation of a public railway from Stanhope to the Tyne, at South Shields; but, that the Company did afterwards proceed with the formation and construction of such a railroad, and that the defendants were not concerned in the proceedings of the Company, until they entered upon the lands of the defendants.

That in the months of June and July, 1833, workmen were employed in marking out a line of road through "The Deeps," but in August, 1833, a new line was marked out by stakes. That none of the defendants were at first aware that the workmen were employed by the Stanhope and Tyne Railroad Company, but supposed that the line was marked out for a coal road, by the direction of certain lessees of the coal under "The Deeps." That they afterwards ascertained by general report that the line had been marked out by the Company. That in December, 1833, the workmen of the Company railed off the line of road secondly marked out, but that they shortly afterwards abandoned that line and resumed the first line. That the road was completed over "The Deeps" in September, 1834, and is a regular double line of railroad, and the same was then brought into use for carrying coals, but was not brought into full use as a public railroad until April, 1836, since which time the plaintiffs have used the railway between South Shields and the point where it crosses the Durham turnpike-road, at the distance of twelve miles

from South Shields, for the conveyance of coal, lime, manufactured goods, and passengers; but, as the defendants believe, have only used the railway along the rest of the line for the carriage of coal and mineral produce.

That the defendants never knew or were informed that the railroad would be used for every purpose for which a public railroad might be used, or for any other purpose than the carriage of mineral produce, until the Company began to carry general merchandize and passengers along the railway after the same was completed. That during the whole time that the Company were engaged in their works across "The Deeps," the defendants were ignorant of the purposes for which it was made, and they fully believed that the Company had a right, under the authority given to them by the Dean and Chapter, to make such a railroad as they were making. That even had they been informed of, or had suspected that it was the intention of the Company to use the railway for general purposes, yet that the defendants had no means of proving that the Company were committing a trespass, inasmuch as it would have been impossible for the defendants to have proved that the railway was made for general purposes until actually so used. That at that time a considerable uncertainty of opinion prevailed as to the extent of the right under the reservation in the leases of the Dean and Chapter, and the construction of the reservation had not then received a judicial determination. The defendants submitted, that the Company ought, under such circumstances, to have taken care to ascertain that the Dean and Chapter had reserved to themselves the powers of granting such a right of way as was required, over the lands of their lessees, or otherwise to have entered into contracts with such lessees, in the same manner as with other landowners, before they expended money in making the railroad over the same. That to the action commenced by the defendant W. Wallis the plaintiffs have pleaded, (among other pleas) that the trespass was committed by

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the leave and licence of the defendants, and also have pleaded the lease of the 26th of October, 1833, from the Dean and Chapter to the plaintiffs.

The answer then entered into explanations as to passages in letters set out in the bill, and stated, that the following passage in the letter of the 24th of January, 1832, "the continuation to the Tyne is Mr. Harrison's project," referred to the idea which had been started, of carrying the railway from Medomsley to the Tyne at Dunstan Hill; and that the following passage in the letter of the 10th of December, 1831, "the public will then believe we do not intend to go further, and will not attend to any representations of an ulterior object, should it unfortunately transpire," referred to the project of making branches to the different coal mines in the parish and neighbourhood of Lanchester.

The defendants obtained the order *nisi* for dissolving the injunction.

Mr. *Pemberton*, Mr. *Turner*, and Mr. *Piggott*, shewed cause on the merits.

Mr. *Kindersley*, and Mr. *Faber*, for making the order *nisi* absolute.

Mr. *Pemberton* replied.

[The arguments are given on the appeal motion.]

August 3rd. MASTER OF THE ROLLS.—The defendants, Mr. Wallis and his family, are the beneficial owners of a lease granted by the Dean and Chapter of Durham. In that lease the lessors have reserved a right of granting way-leaves on peculiar terms, and professing to act upon their reserved right, they have granted to the plaintiffs way-leaves to enable them to construct a railway; and the plaintiffs, acting professedly in pursuance of the right granted, have constructed a railway over the lands leased to the defendants. The defendants allege

that the plaintiffs are using that right to an extent which the Dean and Chapter were not authorized to grant, because not within the terms of the reservation. Now, whether, upon the construction of the terms of the reserved right, or of the grant made by the Dean and Chapter, that is so, are questions merely legal, and not to be determined by me at this time, nor by this Court at any time. One argument adduced by the counsel for the defendants must, I think, be concurred in, namely, that without the authority of an act of Parliament, no man can deal with the property of another against the consent of the owner; and that the owner, if his consent is asked, may demand what price he pleases for that consent; because, having the power absolutely to refuse, he may refuse until his own terms are complied with; and the price of his consent must be determined by himself and not by the party with whom he is dealing.

But on this occasion, the question is not whether the defendant has, under his lease, a legal right to the redress which he seeks at law, but whether by agreement, acquiescence, and conduct on his part, he has not precluded himself from taking advantage of his legal rights, whatever they may be.

In the year 1833, the plaintiffs began preparations for constructing a railway over a close of land called "The Deeps," comprised in the lease to the defendants; they began their operations in a manner which was not entirely justifiable, for they changed from one place to another in a manner calculated to do more damage than was necessary: with that circumstance however, I have nothing to do on the present occasion. The operations of the plaintiffs were commenced in April, 1833, and, after very considerable interference with this close of land, the line of road was ultimately determined upon. In December 1833 the line was finally staked out. The defendants say, they did not *interfere* with the proceedings of the plaintiffs for this rea-

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son: They knew that the Dean and Chapter had reserved a right of granting way-leaves over this land, to be used in a certain manner, and therefore they did not interfere to oppose the construction of the railway, not knowing that they had any right so to do, there being no reason for them to think, and nothing which would positively shew, that the plaintiffs intended to use it for any purpose inconsistent with the right reserved to the Dean and Chapter; therefore they permitted the plaintiffs to go on, and could not know that they were about to make an illegal use of this, until the year 1836, when, after the railway had been opened for several purposes, it was first extended to those purposes, which, as the defendants are advised, are inconsistent with the terms of the reservation. This allegation on the part of the defendants makes it necessary to look a little further into the relation which subsisted between the litigant parties. In the year 1833, whilst these operations were going on—at any rate in the latter part of that year, the defendants knew that the persons who were constructing the railway were the plaintiffs, and the defendant Wallis, who had had dealings and connections with them, admits in his answer, that he knew in the month of December, 1833 that the plaintiffs, or the persons calling themselves the Stanhope and Tyne Railway Company, were the persons constructing the Railway.

It appears to me singular, that a person living within a short distance of the place where his property was being so dealt with, should not have had the curiosity to inquire who it was that was ruining his field, and ruining it in so disadvantageous a manner. Recurring to the origin of this transaction, I find that in 1831 the defendant W. Wallis, being the owner of land at a place called Muggleswick, which land required the use of lime for its proper culture, suggests a mode by which lime can be supplied to himself, and other persons in the like situation, by having a railway constructed from Stanhope to Muggleswick. He is the person who suggested this plan, and

he communicates it to a Mr. Rippon, who had certain lime rocks. The project, then, in its incipient state, seems to have been, to construct a railway to convey lime from Stanhope to Medomsley, and to convey coal back again.

Now, when persons are constructing a railway, although their main object may be to convey lime in one direction, and coal in another, it can be easily conceived that they would not intend to confine the use of the railway to these two purposes exclusively; it is hardly to be believed, that having constructed their railway, they studiously intended to avoid any other use of it. That it was not the intention of these parties so to confine the use of their proposed railway is, in my mind, perfectly manifest from what took place when it was begun; for, with the view of seeing that there was some foundation for the contemplated speculation, Wallis himself, on the 30th of November, 1831, enters into an arrangement with a Mr. Selby, and procures from him a way-leave across his ground—a way-leave for coal, lime, and other goods generally; so that it is clear, that at that time Wallis had not in his mind the idea that the association which he wished to establish should be exclusively confined to the carriage of lime and coals. It is indeed admitted by him, that other things, and in particular that millstones were to be carried on this railway. On the 1st of December, 1831, I find Wallis writing to the Dean and Chapter, asking for a certain right of way, and asking that it should be a permanent right of way for general purposes. It is therefore perfectly manifest that there was no intention, on the part of Wallis, to confine the railway, when perfected, exclusively to coal, lime, and millstones, or to any other particular thing. What the parties were seeking for the common benefit of those who should engage in the speculation was, a way-leave for general purposes.

Such being the intention, it appears, that a suggestion was made that it might be useful to extend this line from

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the limits originally intended, from Stanhope to Medomsley, to other places; that it should even go as far as the Tyne. Now there are several documents, from which it is perfectly manifest that this was suggested, and was contemplated as being possibly the result of the association. That these parties had made up their minds conclusively as to what they were to do, or what the direction of the road was to be, I do not conceive; I am speaking of the time at the end of 1831, and the beginning of 1832: but that they were then contemplating an enlarged speculation, something beyond the mere construction of a railway from Stanhope to Medomsley, is what, upon the documents admitted in the answer, I can have no doubt of. It is necessary, certainly, to be careful not to impute to Wallis every thing that was in the contemplation of the plaintiff W. Harrison; but it must not be forgotten that Wallis and W. Harrison were partners in a common project, and that which each was doing was to be for the benefit of himself and the other, and for the whole concern. Now these parties did not very long continue in a state of agreement, Mr. Rippon left them in the early part of 1832. In January, 1832, Wallis writes a letter, in which he mentions "the continuation of the line to the Tyne, as being a project of W. Harrison." In March, 1832, Wallis withdrew from the speculation, which, as far as I can see, had not then begun to be carried into execution to any considerable extent; and he withdrew in consideration of £3000, afterwards commuted to the sum of £2000, which he was to receive at certain dates, and he received it. There was, however, a condition that he was to aid and assist in carrying on the project, which in the paper is called "their project," their project being that of the whole partnership; and in case they abandoned the same he was to have what is termed "the goodwill." What that meant, I own I have some difficulty in understanding; but it would seem to be this, that if they should not succeed

in their project to a certain extent, then they were to give it up to him. There was a project for a railway from Stanhope to Medomsley, extended by the partners themselves as far as the Tyne; and the occupation of the ground by one set of persons might be an inducement to all other parties to withhold until they saw what could be done; and this engagement about the goodwill, is an engagement to abstain from all competition and obstruction; and there was in this agreement a direct and positive engagement that he should aid and assist them in carrying out their project.

Now when I come to see that Wallis was, in 1833, observing the work going on across his field, and the knowledge he had in his mind that there had been an intention of carrying it to the Tyne, there seems strong reason to suppose that it must ultimately—or rather may ultimately—for I have no right to give a strong opinion as to the result of this cause; but it may ultimately appear that he saw those proceedings going on with such a knowledge of what it was the intention of the parties to do with the work when completed; that his standing by and seeing it completed at their expense, making no claim to compensation, and no opposition until the work was done, has precluded him in a Court of Equity from exercising his legal rights: there is, I say, so much reason to think that ultimately there will be an equitable ground established against him of this kind, that I ought not in this stage to permit the action to go on.

The bill seeks equitable relief on the ground that the party ought to be protected from the consequence of the defendant taking advantage of his legal right, if he has it. If that ground prevails at the hearing, the legal right will never have to be determined: on the other hand, if that ground fails, the legal right will be preserved to the defendant in all its integrity, and he will be entitled to compensation; but until that equitable question, which is para-

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mount, is disposed of, there will be no question to be decided at law. I think, therefore, the injunction must be continued.

The defendants appealed.

Mr. *Stuart*, Mr. *Faber* and Mr. *Watson*, in support of the appeal motion.

The words "aid and assist" will be relied on as amounting to a contract by Wallis, to permit the plaintiffs to make their railway over his land, although at the time he was entirely ignorant of any intention on their part so to extend the railway;—even then, a question remains. It must be held, that those words extend to more than a contract not to oppose the plaintiffs in anything coming within the meaning of "their project," and amount to an absolute agreement to part with the lands without compensation. The bill does not put the case so high; it admits that the defendants are to be compensated for the land: this is all that Wallis seeks in his action. Whenever an act of Parliament is made, authorizing the formation of a railway, it always specifies how landowners are to be paid for land taken, and companies are not permitted to enter on lands until the value is ascertained, and either paid or secured: therefore, even if the plaintiffs are, by virtue of the agreement of March, 1832, entitled to pass over the land in a mode beyond what the grant of the Dean and Chapter can authorize, compensation must be first ascertained, and paid or secured.

Acts of acquiescence by the plaintiff in an action of trespass, may be made available by way of defence in a Court of law: true, they cannot be pleaded as conferring an easement, because easement lying in grant, can only legally pass by deed; but they are facts to go to a jury as excusing the trespass. Acquiescence may afford good reason for refusing to the acquiescent party the extraordinary assistance of a Court of equity, leaving him to his rights

at law; but no principle and no case supports the doctrine, that a Court of equity has on mere acquiescence enjoined legal rights.

Mr. *Wigram*, Mr. *Turner*, and Mr. *Piggott*, in support of the order of the Master of the Rolls.

If to support this injunction, it were requisite to read from the answer admissions which would entitle the plaintiffs, without going into evidence, to a decree, it might be difficult to sustain the injunction; but the rule of equity on which the Master of the Rolls acted, is sound and well established; namely, where a plaintiff shews fair and probable equitable ground for superseding an action of law, the equitable case is paramount the legal, and must be first disposed of.

Perceptive knowledge and tacit acquiescence, by one party in the expenditure of money by another, has been held sufficient to warrant a Court of equity interfering, even with legal rights. *Lewis* v. *Lord Cawdor* (*a*), *The East India Company* v. *Vincent* (*b*). [*Lord Chancellor*.—In those cases, was there no connection in tenancy between the parties? The proposition seems very large, that this Court is to prevent a party asserting legal rights, because he has stood by and seen money expended.] A tenant laying out money, does not furnish so strong a case as that of a stranger, because the expenditure may be referred to his existing tenancy; but even in the case of a tenant, your Lordship, in a late case of *Mundy* v. *Jolliffe* (*c*), held, that where a tenant had expended money in the full expectation that he was to have a renewed lease, the landlord was bound to give him a lease; although the landlord denied any agreement to do so, and the only evidence to warrant the expectation, was a private memorandum which came,

(*a*) 1 Y. & Coll. 427. (*b*) 2 Atk. 83.
(*c*) Law Jour. Vol. 9, N. S., Chanc. p. 91.

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not out of the possession of the landlord or of the tenant, but of the landlord's steward. Every man has a right to build up to the confines of his own land, and after he has done so, his adjoining neighbour may, by a building on his land, exclude the light from the first building; but not if that neighbour has stood by, knowing of and seeing the completion of the first building. *Stiles* v. *Cobham* (*a*), *Bowes* v. *East London Water Works Company* (*b*), *Jackson* v. *Cator* (*c*), *Bridges* v. *Kilburne* (*d*), *Pilling* v. *Armitage* (*e*), *Attorney-General* v. *Balliol College* (*g*), *Hampden* v. *Ferrers* (*h*), *Greenhalgh* v. *Manchester and Birmingham Railway Company* (*i*).

[The Lord Chancellor intimated that the reply might be confined to the point, whether the plaintiffs ought to have liberty to renew their application for an injunction after verdict.]

Mr. *Stuart*, in reply.—The whole case is before the Court; it rests entirely upon documents, all of which are stated on the pleadings; there is no one point in the bill as to which extrinsic or oral evidence can be gone into, to prove circumstances or facts not admitted on the answer.

No acquiescence, short of actual agreement, will suffice to sustain the plaintiff's case; there must be nothing equivocal in such an agreement—nothing to raise it by inference. The cases cited are all cases where a party building on another's land had some colour of title to do so, and therefore might have been led into error by the acquiescence of the other party; that is not the fact in the present case.

(*a*) 3 Atk. 692.
(*b*) Jacob, 324.
(*c*) 5 Ves. 688.
(*d*) Ib. 689.
(*e*) 12 Ves. 78.
(*g*) 9 Mod. 411.
(*h*) 1 Eq. Ca. Ab. 356, pl. 10.
(*i*) 3 Myl. Cr. 784; *ante*, Vol. 1, 68.

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LORD CHANCELLOR.—The injunction as it stands prevents the plaintiff at law, the defendant in equity, from proceeding in his action, and ties up his legal claim until such time as the cause shall be heard in this Court: the effect of which is, that if the plaintiffs in equity shall not succeed in proving their case at the hearing, the plaintiff at law will have to seek his remedy from whatever source he may then be able to obtain it; that source being necessarily very uncertain.

The matter in contest depends on three questions, two of them being questions for a Court of law, the third a question for equity. If either of the two questions for law are decided in favour of the plaintiffs in equity, there will then be no question for this Court. The plaintiffs in equity say that the plaintiff at law has no right to proceed in his action, because they say that what they are doing is within the terms of the reserved license of the Dean and Chapter of Durham, whose grantees they are. That is a question for law, and one which in fact is now pending at law in another cause. I have no right for that reason to stop this action, or to make the parties wait for the decision of another cause, which ultimately may not be determined. Parties have a right to conduct their own causes in their own way. Now if the plaintiffs in equity are right in this first point, there is no other question—that is decisive. The next question is, if they have not that right, or, having it, the license does not go to the extent alleged, still whether the plaintiff at law has or not by contract given them the necessary leave or license? That also is a question for law, and a question depending in this action; if satisfactory proof is given of that allegation there is also an end of the case; if the defendants at law succeed in that, there will be nothing for this Court to decide.

There is then the third question, which, as I have said,

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can only arise in the event of the plaintiffs in equity failing in both questions at law; it is this, whether even if there is no leave or license of either kind for the works, still the defendant in equity has, with a full knowledge of what the plaintiffs in equity were proposing to do, so conducted himself as that he has raised in equity a bar to his legal rights? That is a question for equity, and depends on a variety of circumstances which may or may not be proved in this cause. It may depend on how far the party now asserting legal rights, knew of those legal rights, and that the other party was invading them, and how far he has by acquiescence lost those legal rights. There may have been ignorance of the right in both parties. The defendant in equity may not have known he had a right to stop the Company; or, if knowing his right, may not have known that they were invading it. A strong case of acquiescence would probably be required; at all events it would be hazardous to dispose of such a case on an interlocutory application. But all this may never arise.

A party applying for the aid of a Court of equity, against a legal action to which he states he has no defence at law, must, in order to obtain it, give judgment in the action. If he wishes to go on and defend the action, he must postpone his application to this Court until after the result of the trial of that action. If I continue the injunction I shall have no opportunity of knowing what is the amount of the damages which a Court of law would give in this case; whereas, if the action proceeds to judgment, I shall then have ascertained by a Court of law the amount of damages, and shall, if the plaintiffs come back to this Court, know what sum to secure in this Court.

I think the action ought to be tried, and ought to proceed, not only to trial but to judgment. I give no opinion as to the equity of the case; and, to prevent the order

which I propose to make being quoted as an expression of my opinion, I shall merely discharge that part of the order which prevents the plaintiff at law proceeding with his action, and order the rest of the motion to stand over, giving liberty to apply.

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BARNARD v. WALLIS.

1839. *Nov. 6th. Dec. 12th, 13th, 14th, 16th, 17th.*
1840. *January 14th, Feb. 22nd, 26th. Nov. 17th.*

Between ROBERT ILLINGWORTH and others, Complainants,
and
THE MANCHESTER AND LEEDS RAILWAY COMPANY, - - - - - - Defendants.

A railway Company made excavations upon their own land, the purpose of which was the partial diversion of the stream of water of a navigable river, and the works so prosecuted necessarily occasioned the obstruction of a private road.

The plaintiffs, who were the owners of a fulling-mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the act. The plaintiffs, who had a right of way over the private road, also alleged that the Company were interfering with the road without the performance of the conditions imposed by the Railway Act as preliminary to interfering with the road.

Held, that although the Company were working on their own land, the plaintiffs must be held to have had notice of the intended works of the Company, and had by an acquiescence for eighteen months, during which the Company had expended a large sum of money on the works, precluded themselves for asking for the interposition of this Court by injunction.

Semble—The plaintiffs, although interested by the situation of their property, or the nature of their business, in preserving open the navigation of the river Calder, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the Railway Acts protecting the Calder navigation from injury by the railway works.

THE bill stated that the plaintiffs are the absolute owners and proprietors of an extensive mill and factory, called Healey New Mill, situate in the township of Ossett, in the county of York, abutting on and bounded by the north bank of the river Calder; and they have for many years carried on in copartnership together, a very valuable and extensive trade as fulling and scribbling millers, and the value of the mill and premises depends entirely upon its situation upon the banks of the river, whereby it possesses and enjoys the free use of a constant running stream of water, which is absolutely necessary for various purposes of the business of the plaintiffs, and without which it would be impossible to carry on their said trade. That as owners of the mill, they are also entitled to, and possess and enjoy a right of road called "Jacob Road," which runs from the

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mill across a piece of land, which at the time of the passing of the two acts of Parliament first hereinafter stated, was the property of a certain partnership, called "Healey Old Mill Company," and which right of road was awarded and given to the plaintiffs about twenty-six years ago, by the award of the commissioners of the Ossett inclosure act; and it was by such award prescribed and directed, that the road thereby given to the owners of Healey New Mill should be at least fifteen feet wide; and accordingly plaintiffs have ever since the award, enjoyed, and are now entitled to enjoy a road, being at least fifteen feet wide, and such road has hitherto been the only means which the plaintiffs possess of conveyance by land, of goods and materials to and from their mill, and of approach thereto from the main road to such road, and the circumstance of the same being direct and wide, is of great value and importance to the plaintiffs in their business.

The bill then stated the act of Parliament authorizing the making and maintaining a railway from Manchester to Leeds (*a*), the 3rd section empowering the Railway Company to make and maintain the Railway. The 94th section (*b*), conferring on the Company the usual powers for such purpose, and among others, to divert or alter the course of any streams or waters, roads or ways. The 20th section, enacting that nothing in the act contained should take away, diminish, alter, lessen, prejudice, or affect any of the rights, privileges, powers, or authorities of the Company of Proprietors of the Calder and Hebble navigation, or authorize or empower the Railway Company to alter the line or level of the navigation, or the towing-paths thereof, or to divert any of the waters therein, or any other waters which then supplied or might be taken for the use of the navigation, unless the same last-mentioned waters should be taken in such a course as not to injure or prejudice the said navi-

(*a*) *Ante*, Vol. 1, 576. (*b*) Ib.

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gation, or to injure or interfere with the wharfs, or any of the works of the said Navigation Company (otherwise than as therein specially provided for), and that it should not be lawful for the Railway Company to make any deviation from the line of the Railway, as laid down in the parliamentary maps or plans, by which deviation the said navigation should be taken, damaged, or interfered with, without the consent of the Navigation Company, under their common seal, first had and obtained. The 97th section providing that in all cases wherein, in the exercise of any of the powers of the act, any part of any carriage or horse-road, or foot-road, either public or private, should be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or for the transporting or carrying of any goods or merchandize, or to the persons entitled to the use thereof, the Company should at their own expense, before any such road should be so cut through, raised, sunk, taken, or injured as aforesaid, cause a good and sufficient carriage or horse-road to be set out and made instead thereof, as convenient for passengers and carriages, and for the transporting or carrying of goods or merchandize, as the road to be cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as might be, and should cause the same to be put into good and substantial order and condition, where the former road could not be more easily restored.

That the line of railway as laid down on the maps or plans would have passed at some distance south of the Calder, and would not in any manner have affected the course of the river, or have interfered with the waters thereof; and the powers given by the act would not in any manner have authorized the Company to divert the course of the river, the same being part of the line of the navigation which the Company are expressly prohibited from altering.

That some time afterwards the Railway Company deter-

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mined to alter the line of the railway, and to carry the same on the north side of the Calder, and in a line which traverses the piece of land over which the plaintiffs possess such right of road as aforesaid, and for the purposes of such alteration it became necessary to make a bridge over the Calder, but not to make a diversion as hereinafter mentioned; and accordingly, the Company obtained an act (*a*), enabling them to vary the line of the railway, whereby it was amongst other things enacted (section 1) that all the powers, authorities, provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, clauses, rules, matters and things, comprised in the said first recited act, except such of them as were by the now reciting act repealed, altered, or otherwise provided for, or rendered unnecessary, should extend or be construed to extend to the now reciting act, and to the several works and things thereby authorized or required to be made and done, and should operate and be in force in respect of the objects and purposes of the said first act, as altered and amended by the now reciting act, as fully and effectually to all intents and purposes as if the same were enacted in the now reciting act. Section 2 empowering the Company to make variations, alterations, or deviations in the line authorized by the first act, and enacting that the powers contained in the first act should apply to the new line, and the works connected therewith. Section 3 empowering and requiring the Company to alter and divert the stream of the Calder and other streams and waters connected therewith, within the parish of Halifax, in the West Riding of the county of York, and specifying the several alterations and diversions to be made.

That the line of the railway as altered by the last mentioned act crosses the piece of land over which the plaintiffs have the right of road, but not in a manner which

(*a*) 5 Will. 4.

would render it at all necessary that the direction of the road should be altered, or the use thereof by the plaintiffs materially interfered with; and the last recited act did not, in the diversions of the Calder thereby authorized to be made, mention the particular diversion thereof hereinafter complained of. That inasmuch as the plaintiffs were affected by the last recited act, they were served by the Company with notice dated 1st December, 1836, of an intention to apply for the same.

The bill then stated a third act of Parliament of the 2nd & 3rd Vict. for altering the line of the railway, and for amending the acts relating thereto; and it stated sect. 2, authorizing and empowering the Company to make the diversions of the Calder therein mentioned, and specifying the several diversions thereby authorized to be made. Section 5, giving to the Company full power, in making such diversions, to deviate from the respective lines laid down on the several plans of the railway. Section 11, re-enacting, for the purposes of such alterations as are specified in the last recited act, all usual and necessary powers, in similar terms to the 94th section of the first recited act.

That the diversion of the Calder hereinafter complained of is at a different place, and in a different township from the place where the plaintiffs' mill and premises are situate; and it could not be discovered from the said act or from any of the plans or books of reference, that the plaintiffs' mill and premises or the said road would be interfered with further than as is before mentioned: That previous to the application for the act, the Company applied to the plaintiffs for their consent thereto, but they did not state or give any intimation either of altering the direction of the road, or of diverting the course of the river, otherwise than is hereinbefore mentioned. That the Company have lately purchased the piece of land

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over which the said road passes subject to the plaintiffs' right of way.

That some short time since the Company began to make excavations in the land bought by them near to the said road, but which did not interfere with the same. That the plaintiffs, believing that there was a design on the part of the Company to divert the river, some of them called on the acting director of the Company, and stated the injury that they would sustain thereby; but they were assured that no damage was intended to be done to them; and the plaintiffs, being advised that they could not prevent the Company from doing as they pleased on their own ground, did not then institute any proceedings for relief.

That on or about the 3rd of October, 1839, it became apparent that the Company intended to divert the course of the river, and to carry it along a new cut running across a close of land purchased by them, which will enter into the present bed of the river, to the north of the plaintiffs' mill at the one end, and to the east thereof on the other end; and the object and effect of such diversion will be to turn the whole of the water of the river along the cut, thereby giving an entirely new direction to the river, and leaving the whole of the bed of the river, for some distance immediately above and below the plaintiffs' mill and premises, wholly deprived of a running stream of water.

That on or about the same 3rd of October the Company, without any previous notice or intimation of their intention, took possession of the said road leading to the plaintiffs' mill and premises, and have stopped up the same, and threaten and intend to cut through the road, and to carry across it the channel of their intended new cut. That the plaintiffs immediately thereupon caused the Company to be served with a notice as follows—[The notice was set out, to this effect:—"As attorney for the owners of Healey New Mill, I give you notice not to divert the

river Calder; and I also discharge you from entering upon or intermeddling with any of the lands over which the said owners have a right of road or way, or with the said road; and I give you notice that an action of trespass will be commenced against you, and an injunction applied for, in the Court of Chancery.—W. Stewart."—"To the Manchester and Leeds Railway Company."]

That the Company have not yet constructed any permanent road for the carriages and carts used in the conveyance of goods to and from the plaintiff's mill, but that previously to their entering upon the road called Jacob road they made a temporary road to the mill, which is altogether unfit and insufficient for the conveyance of the goods of the plaintiff to and from the mill; and plaintiffs have sustained great difficulty, delay, and danger in passing over such temporary road; and it is impossible for carts, loaded in the manner in which the carts that used constantly to pass to and from the mill along Jacob road were loaded, to pass along the temporary road. That the road which the Company intend to be the permanent road substituted for the Jacob road is more than double the distance of that road, and some part of it is designed to pass over the bridge to be built over the bed of the Calder, where the same is intended to be diverted; and such part of the road the Company intend to make of a less width than eleven feet, which will not admit of two carriages passing each other, or of a boiler for the steam-engine employed in the mill passing thereto. That the road is also meant to pass under an arch of the bridge, the height of which will be ten feet, or thereabouts, and insufficient to allow a waggon or cart fully laden with wool or materials to be used at the mill to travel under the same; and such intended road is proposed to take a long and circuitous course, thereby greatly increasing the distance to be travelled, and the intended road will very materially injure the mill and premises, and render it highly inconvenient to form a traffic

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to and from the same, and will greatly increase the expense of carrying on business at the mill.

The bill charged, that the Company are not empowered or authorized by their acts to make any other diversion of the Calder than such as they are expressly and in terms authorized to do by the said two last-recited acts. That the excavation and the threatened diversion of the river are not works necessary for the purposes of the railway, and the excavation has been made in order to relieve the Company from an additional expense that would have attended the construction of a bridge over the Calder, in the line in which the railway crosses it; for that according to the secondly recited act, the railway was to be carried over a bridge across the bed of the river, above the plaintiffs' mill, and which bridge would not in any manner interfere with the plaintiffs' use and enjoyment of their mill, or of the stream and water of the river.

That in cutting through the banks of the river at each extremity of the new Channel, the Company will deviate from the line as delineated in the maps and plans more than one hundred yards. [The utmost limit allowed by the 8th section of the second act for deviation.]

That the plaintiffs always intended and gave notice to the Company that they should immediately apply for the aid of the Court of Chancery as soon as the Company should threaten or attempt to cut through the banks of the river, or do anything which should tend to divert the stream of water.

That the Company are not justified by the act in stopping up and taking away the Jacob road, for that it would be practicable to carry the line of the railway over or across the road, without materially affecting the plaintiffs' enjoyment thereof. That the destruction of the road is not necessary for the purposes of the railway.

That before the passing of the said second act, the Company applied to the plaintiffs for their assent thereto, and

the plaintiffs absolutely refused to assent, unless the road to the mill was kept in a direct line, and equally convenient.

That the Company never informed the plaintiffs that they intended to divert the river, otherwise they would have opposed the bill; and they did not oppose the same, relying that the Company would not materially interfere with the plaintiffs' enjoyment of the road.

The bill prayed that the Company, their servants, &c., may be restrained from cutting through the banks of the river Calder, at the ends or extremities of the new cut or excavation so made, or in course of being made by them as aforesaid; and also from diverting the stream or water of the river Calder in any manner which shall deprive the plaintiffs of the stream of water now running in the bed of the river, by and along the plaintiffs' mill and premises, or which shall interfere with the plaintiffs' use and enjoyment, for the purposes of their trade, of the present course and stream of the river. And that the Company, &c., may be restrained from permanently obstructing or taking away from the plaintiffs the use and enjoyment of the road called "Jacob road." And may also be restrained from making or permitting to remain any temporary obstruction of the said road, until they shall have made and set out a good and sufficient road instead thereof, as convenient for passengers and carriages, or for the transporting, carrying, or conveying of goods and merchandize on the said road, or as near thereto as may be; or if it shall appear to this Court that the Company are entitled to take the said road, subject to the provisions of the act, then that the Company, &c., may be restrained from making or permitting to remain any obstruction to the free use and enjoyment of the said road by the plaintiffs, or any thing which does or shall deprive the plaintiffs from the use thereof, until the Company shall have made another good and sufficient road, as convenient for passengers and car-

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riages, and the conveyance and transporting of goods and merchandize to and from the said mill and premises, as the said road, or as near thereto as may be, and for further relief.

The plaintiffs having filed affidavits verifying the facts stated by the bill, obtained leave from the Vice-Chancellor to give a short notice of motion for an injunction; the Company having appeared to the bill,

Mr. *Jacob* and Mr. *Bethell*, in support of the motion, relied on the facts stated by the bill and affidavits, as shewing a case of irreparable injury.

Mr. *Knight Bruce* and Mr. *Bacon* appeared for the Company, and submitted that no urgent necessity for the interference of the Court was shewn.

The VICE-CHANCELLOR.—I think that I must interfere by injunction, unless the Company will enter into an undertaking. I think that when, as is now done, a plan with a scale of admeasurement is produced, that I am bound to consider that it does represent truly what it professes to represent, and, attending to that, it appears to me that irreparable injury will ensue unless the Court now interferes, for I cannot see how the river can be diverted without interfering with the present supply of water to the plaintiffs' mill. All the water that is to flow into the proposed new channel, must be taken out of the old channel; the water is to be taken out of its natural course, and returned again at that point where the new channel is again to enter into the old one, below the mill. With reference to this particular circumstance, not only is it sworn that it will be injurious to the mill, but the particular loss in a pecuniary point of view is stated. [His Honor read a statement to this effect from one of the affidavits.] Now it struck me that the loss here mentioned is not large, with

reference to what is stated to be the annual profit of the mill; but even if the loss is such as is represented, I think that I ought to interfere by injunction, without any reference to the facts of the case as they may turn out, or to the law, arising from facts of which I am now ignorant: I think, from what is now stated to me, I ought to grant an injunction, or take an undertaking from the Company.

Mr. *K. Bruce*, for the Company, then undertook, during ten days, "not to cut through the banks of or to divert the stream of the Calder, and not further to obstruct the Jacob road."

The undertaking was afterwards withdrawn, and an injunction granted.

The Company filed affidavits for the purpose of procuring the injunction to be dissolved. The material points of the affidavits were directed to shew:—

1st. The time of the commencement of the excavation for the new channel of the river.

2ndly. A formal notice, with a plan annexed, shewing the intended diversion, served on the plaintiffs, and also shewn to their then solicitor; and the intended diversion locally pointed out to one of the plaintiffs.

3rdly. The intention of the Company to continue a supply of water to the mill, and the mode proposed for accomplishing it.

4thly. The necessity for making the diversion.

5thly. An assent by the plaintiffs to the second railway bill upon certain terms, as regarded Jacob road; and a memorandum of an agreement then drawn up.

6thly. That the road complained of is in strict accordance with that memorandum.

7thly. That the new road is more convenient than the old one.

8thly. That any advantage arising from the width of the

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old road was neutralized by reason of the narrowness of its outlet communications.

With respect to the above points, it was deposed to by the surveyors and officers of the Company,

That, in March, 1838, excavations for the channel of the river, and for making a bridge over the same, were commenced, and had been regularly continued up to the time of filing the bill, and that such works were notorious to the whole neighbourhood. J. B. Ash deposed, that a notice, with a plan annexed thereto (*a*), dated the 12th of April, 1838, addressed "To the Trustees of Healey New Mill," was, on the 16th of April, 1838, served on two of the plaintiffs, and a copy thereof left with N. Andley, the manager of the New Mill, which notice contained a statement of the land required to be purchased by the Company, and the plan annexed shewed two pieces of land required; and it specified that one of such pieces, containing 1r. 16p., was required for "the diversion of the river."

J. Clarkson deposed, that he had shewn to the plaintiff Mitchell and to Mr. Archer, who then was the solicitor of the plaintiffs, at different times in May, 1839, a plan, shewing the intended diversion of the river; and in particular, on the 22nd of May, he had an interview with the plaintiff Mitchell, on the land forming the site of the intended diversion, and explained to him the manner in which it was intended to be executed.

Mr. Burke, the principal engineer of the Company, deposed that all the water used by the plaintiffs is pumped from the river into the plaintiffs' premises, through an iron pipe of seven inches in diameter, and the refuse water is discharged from the premises by a sough drain into the river, at a distance of less than forty feet below the point from which the water is pumped in; that it is not intended

(*a*) Exhibits L. & M.

to make any such diversion of the river as can have the effect of taking away from the old channel of the river the whole of the waters thereof, or to make the water stagnant, but that on the contrary it is intended to leave in the old channel, an opening adequate to supply the plaintiffs with a current of water sufficient for the purposes of their trade or business.

That in case a bridge had been erected over the present channel of the river as originally contemplated, the flood-water would have acted with great force against the eastern abutment of the bridge, and against the bank behind the same, and would, in his opinion, have washed away such bank, and thereby rendered the works of the railway unsafe, and the embankment of the railway would have had the effect of turning the goit of the Healey Old Mill into back water, and flooding the lands lying above such bridge; that it therefore appeared to him that the most proper mode of constructing the railway would be to divert the course of the river in the direction of the natural channel, and to place a bridge for carrying the railway over the diverted river course obliquely, so as to prevent any obstruction to the course of the river, leaving in such embankment an opening to admit a quantity of water through the same sufficient for any purpose for which the same might be required.

Mr. Brackenbury, the solicitor and law clerk of the Company, deposed that J. B. Haxby, who was employed to ascertain the assents and dissents to the railway bills, had reported to him that the proprietors of the Healey New Mill assented to the bill, upon certain conditions contained in a memorandum as follows:—"The proprietors of Healey New Mill will assent to the proposed deviations in the line of the M. and L. Railway, provided they have a proper road to their mill, and they will submit to such road being made in either of the ways following. Provided the road now used by them to their said

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mill be so raised by the Company as to be crossed on a level by the railway, instead of raising the railway and passing over the road by a bridge; or, provided it crosses the railway at the same point and level as it is to be crossed by the proprietors of the Low Mill. Provided also, that a good and sufficient road is made for the proprietors of the New Mill, either along the side of and adjoining to the intended railway, or at any point between the two mills, from the New Mill to the point of crossing."

That on the 20th of April, 1838, the said Mr. Archer, together with other persons represented to be the proprietors of the New Mill, had a meeting with the Managing Director and the Solicitor of the Railway Company, and the following memorandum was made by the latter person:—"Healey New Mill to have a side road made along the southerly side of the railway, and to be passed over the new course of the river by widening the railway bridge ten feet, then to pass under the archway, or in case of floods or high loads by a level crossing."

That the road as now diverted, leading to the plaintiffs' mill, is intended to cross the railway upon the same line and level as the road leading to Healey New Mill, the same crossing being common to both, and the diverted road, from the plaintiffs' mill to the place of crossing, is intended to be made along the side of and adjoining the railway, and is in perfect accordance with the above memorandum.

Mr. Burke deposed, that in case Jacob road had been lowered as now desired by the plaintiffs, the same would have stood at a level of less than one foot above the low water level of the river, and the same would have been very frequently impeded, and passengers and goods passing along the same exposed to danger by reason of floods. That in case the same road were made to pass under the railway at such low level, and then be raised so as to pass over the new channel of the river of the same height as

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the bridge is now built over the same, then it would have been necessary to make the same road of an inclination of one foot in nine feet.

That the width of Jacob road at the northern entrance thereof is limited by the gate-posts, one of which is five feet two inches in perpendicular height, and the other of which is nearly of the same height, but a little slanting; and such posts are placed in the ground at a distance of nine feet six inches from each other. That the southern entrance is limited by two stone gate-posts, five feet in height, at a distance of nine feet one inch from each other; but in the inside of each of the posts, and close adjoining to the same, are placed two curb-stones, each one foot in height and one in breadth; and the space between such curb-stones is only seven feet.

That a boiler of a steam-engine of the dimensions mentioned in the bill, could not possibly be conveyed to the plaintiffs' mill.

Several other witnesses deposed, that neither foreign nor English wool is usually in packages exceeding nine feet six inches in length; that loads of wool, of the width of twelve feet, lying across carts, could not be carried along the roads in the neighbourhood of and leading to the plaintiffs' mill. The following measurements of archways and yards, leading to the principal wool warehouses in the neighbourhood, were specified: in the town of Wakefield, an archway eight feet ten inches in width, and twelve feet six inches in height, for a length of thirty feet; an archway ten feet nine inches in width, for a length of forty feet; an archway eight feet eleven inches in width, and twelve feet in height, for a length of thirty-six feet.

Affidavits in reply and in rejoinder were filed.

Dec. 12th.

December 12th, Mr. *Knight Bruce* and Mr. *Bacon* moved to dissolve the injunction.—Whatever right the plaintiffs may originally have had to an injunction, they have lost by a

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knowledge of and acquiescence for eighteen months in the works now complained of: *Greenhalgh* v. *The Manchester and Birmingham Railway Company* (*a*).

The injunction was obtained virtually *ex parte*, upon a suppression of material facts.

Independently of these two grounds, in point of law the injunction cannot be sustained. The 94th section of the first act confers on the Company the most ample powers of dealing with any impediments in the course or line of the railway as then laid down. The second act, authorizing a deviation of the line, has a reference by relation to, and extends all the powers given by, the first act to the second act (sec. 1). The Company, by diverting the river, do not divert the line of the railway, to which case alone the limitation in the deviation clause applies.

The Jacob road is as convenient as the old road, or as nearly so as may be; at all events, it is in strict conformity with the contract between the parties.

Mr. *Jacob* and Mr. *Bethell*, in support of the injunction. —The argument of acquiescence may be put entirely out of the question. The Company have been working on their own land, and the plaintiffs could not have prevented them doing so: it was not until the banks of the river were threatened to be cut, that the plaintiffs were inclined to interfere. This case is distinguishable from that of *Greenhalgh:* in his case the Company were acting in defiance of legal rights; here they have been acting in pursuance of them.

The 94th section of the first act, which confers on the Company the power of diverting rivers, expressly subjects that power to the restrictions imposed by the act. There are in the act restrictions of different kinds, some altogether prohibitory, others prohibitory unless under certain

(*a*) 3 Myl. Cr. 794; *ante*, Vol. 1, 68.

regulations, or with consent; one restriction, altogether prohibitory, is that imposed by the 20th section; as to diverting any of the waters in the navigation, a second prohibitory; as to diverting any waters supplying the navigation, unless in a mode so as not to injure the navigation, a third prohibitory, unless by consent. The Navigation Company are empowered in the last part of the section to consent to a deviation in the line, but they have no power of consenting to any infringement of the prohibitions in the former part.

Conceding that the general powers specified in the 94th section of the first act, are incorporated by relation into the second act, those powers would still be circumscribed, as far as regards the navigation, because the third section of the second act gives special powers for diverting the navigation, and consequently excludes the application of the general powers.

The powers of deviation are limited not to the railway only, but to "the other works." Can it be said that the diversion of the river does not fall within the term "other works?"

With regard to the "Jacob road," it is proved that the substituted road is not so wide as the old road, and no reason is shewn why it cannot be made as wide as the old road. *Regina* v. *The London and Birmingham Railway Company* (*a*), neither is it in a direct line, *Spencer* v. *The London and Birmingham Railway Company* (*b*), *Kemp* v. *The London and Brighton Railway Company* (*c*).

Mr. *K. Bruce*, in reply.—The power of diverting the water in the navigation is not altogether prohibited. The Company are not to divert "the waters in the navigation, or any other waters which now supply or may be taken for the use of the navigation, unless the same last-mentioned waters be taken in such a course as not to injure or prejudice the navigation." "The same last mentioned-waters"

(*a*) *Ante*, Vol. 1, 317. (*b*) Id. 159. (*c*) Id. 495.

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are necessarily connected both with the waters in the navigation, and the waters which now supply the navigation: putting the plaintiffs' case at the highest, they would have to prove that there was an injurious diverting to bring their case within the letter of the act. The plaintiffs cannot maintain their injunction upon any title in the Navigation Company.

The powers of the 94th section as incorporated into the second act, are in nowise limited by the 3rd section of the second act; that section is obligatory on the Company to make certain diversions of the Calder, and cannot circumscribe the discretionary powers given by the 94th section.

There has been no deviation even from the works of the railway. The works mentioned in the 8th section of the second act, by which deviation is limited, are works delineated on the Parliamentary plan; it is one of the complaints of this bill, that the Parliamentary plans did not shew to the plaintiffs the fact of the intended diversion.

The language of the injunction, as to "Jacob road," is too large: *Kemp* v. *The London and Brighton Railway Company* (*a*), and *Bell* v. *The Hull and Selby Railway Company* (*b*).

Jan. 14*th*. The VICE-CHANCELLOR.—It seems to me that the proposed diversion of the river Calder is lawful under the 37th section of the act of the 7th of William 4th, if the Calder and Hebble Company give their consent. If it were clear that the proposed diversion would not injure the navigation, I think that under the general powers of the act of the 6 & 7 Will. 4, sec. 94, which are extended to this act, the diversion might be made, but I am not sure that the diversion may not injure the navigation. If it would do so, the Calder and Hebble Navigation Company might interfere to prevent the diversion. In this

(*a*) *Ante*, Vol. 1, 495. (*b*) Id. 616.

cause, however, they are not parties; but as against the plaintiffs, my opinion is, that the Railway Company may lawfully divert the water in the manner proposed, and this Court ought not to interfere to prevent them from so doing; especially as it is proved by J. B. Ash that the Exhibits L. and M., the notice and plan, shewing what land was required for the diversion of the river, were served on the proprietors of Healey Old Mill on the 16th April, 1838, and a copy of them served on the same day on N. Audley, at the New Mill, he being the manager there; and the plaintiffs must of necessity have been aware of the excavations from the time they were begun, and long before the 3rd of October, 1839, on or about which day the bill very unfairly states, it became apparent that the defendants intended to divert the course of the river: therefore the first part of the injunction ought to be dissolved.

With respect to the second part of the injunction, it is extremely difficult to say whether the proposed new road is or not as convenient, or as near thereto as may be, as the old "Jacob road," having regard to all circumstances;—on the one hand, the shortness of Jacob road, and its width in its course, combined with its danger and narrowness at its end, and the circumstance that it was of little value, except so far as it led to Healey Lane, itself of a most variable width;—and on the other hand, the greater length and diminished width in parts of the proposed new road, combined with its safety. But when I see that the proposed new road corresponds with the second alternative mentioned in the memorandum set forth in the affidavit of Powell and Haxby, which, whether it is to be taken as a proposal or an agreement, was, according to the affidavit of three of the plaintiffs, soon after it was made, that is, in January, 1837, left with the plaintiff Stevenson, and therefore gave notice of what the plaintiffs proposed, and when I find from Gooch's affidavit that the

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Railway Company's works have been carried on since March 1838, and that no complaint was made till October 1839, I cannot think this Court ought to interfere. Clarkson in his affidavit swears he explained to the plaintiff Mitchell, on the 22nd May, how Jacob road was intended to be diverted, and the new road carried over the bridge. Mitchell's two affidavits, his joint and his several affidavit, sworn on the 10th and filed on the 12th December, and Stewart's affidavit of the 12th December, in a certain way contradict this. Mitchell is very particular in denial of the first part of Clarkson's affidavit, but very general as to the second part. Stewart admits, the communication may have been made to Mitchell as one of the proprietors of the Low Mill; and Archer makes no affidavit. The balance of evidence is in favour of Clarkson's statement. The bill is very minute in describing the particulars of the intended road, but does not state when the plaintiffs first discovered what they were to be; and a remarkable vagueness of phrase, "lately and sometime since," is to be found in the affidavit of Illingworth, Phillips, and Glover, sworn on the 4th of November. I have not the least doubt, that long before the 3rd of October, the plaintiffs, or some of them, knew what the defendants intended to do; and when I look at the facts, that Mr. Stewart is now the plaintiffs' solicitor, and that Mr. Archer is not,—and considering Mr. Wilby's affidavit respecting the boiler,—the unfair and untrue allegation that the Company's works are done to save them from expense,—that the cutting of the banks of the river will be a deviation,—and that no complaint is made till after the time had expired for enabling the defendants to compel a sale of land to them, I cannot help regarding the plaintiffs' case as one not to be supported in equity.

With respect to the temporary road, it is a remarkable fact, that the notice set forth in the bill made no complaint in respect of it. Mr. Gooch swears, that if the

road had been improper, and he had been informed thereof prior to the filing of the bill, he would have taken adequate measures to have made the same proper and sufficient, without any application to a Court of equity. I think no application for an injunction ought to have been made, and that the injunction must be dissolved with costs, according to the defendants' notice of motion.

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The plaintiffs appealed.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Bethell*, in support of the appeal motion.

Mr. *Knight Bruce*, and Mr. *Bacon*, in support of the order of the Vice-Chancellor.

November.

The LORD CHANCELLOR.—It appears that the two objects of the injunction, as originally applied for, were, first, to prevent the diversion of the waters of the Calder from the mill of the plaintiffs, as depriving such mill of the use of a running stream, stated to be essential to the plaintiffs' business; and, secondly, to compel the defendants to provide a better road in the place of the former private road, called "Jacob road." But another ground was taken in argument; which is, that the defendants were about to divert the waters of the Calder, so as to destroy or injure the navigation in a part in which the plaintiffs, as owners of the mill, were interested. This latter point is scarcely alluded to in the bill, and but slightly touched upon by the affidavits upon which the injunction was originally applied for: and this was urged as an answer to this part of the application. I am, however, of opinion, that there is sufficiency of allegation both in the bill and the original affidavits, to give the plaintiffs the right of discussing their alleged grievance on this point. I must therefore consider the three grounds for the injunction as open.

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To the whole of the plaintiffs' case, an answer has been raised, which, I think, makes it unnecessary for me to go much at length into the points that are peculiar to each of the subjects of complaint. The bill was filed and the application for an injunction made in November, 1839. The defendants' affidavits, particularly those of Faviell, Brackenbury, Gooch, and Burke, state that the works for diverting the course of the Calder, which necessarily involved the obstruction of Jacob road, were commenced in March, 1838; that what was intended to be done was manifest, and that some of the plaintiffs had made inquiries on the subject, and expressed themselves satisfied with what was projected; and that since that time about £5500 had been expended on such works. With respect indeed to some of the objections now made to the alteration of the road, the affidavits bring back the acquiescence to January or February, 1837, and state that they approved of the road as now prepared to be made in April, 1838: that what is now required with respect to the road, cannot be effected without the purchase of land, which power the defendants no longer possess, and that the requisition was not made until after the time within which the power of the Company to purchase land was restricted, had expired.

To the case so made by the defendants there is no substantial answer by the plaintiffs; indeed in their affidavits of the 6th of December, 1839, they admit they knew of the intention of the defendants to divert the waters of the Calder in April, 1838, but that they did not institute any proceeding to prevent it, because they were advised that they could not prevent it. The case therefore is one in which, for eighteen months at least before any application was made to this Court, the plaintiffs were aware of the works of which they now complain, and, as the defendants say (and I think prove), acquiesced in them, (although this acquiescence is in part denied by the plaintiffs), during which period the defendants have, with the knowledge of

the plaintiffs expended very large sums on the works now complained of. If therefore the plaintiffs in the spring of 1838 had an equity to restrain the defendants from prosecuting the works now complained of, it would have been very difficult for them to have made a case to entitle them to the interposition of this Court; and it is perhaps not necessary therefore to inquire whether such equity ever existed.

I cannot, however, but observe, that, as to any intention of the defendants to deprive the plaintiffs of a stream of water necessary to their business, the plaintiffs have, I think, failed in their proof; and if they had proved it, there would still remain the question, whether the defendants are not, by the acts, entitled to deal with the plaintiffs' interests in the waters, making such compensation as the acts require. The powers to divert rivers and streams are very extensive; and although there is a qualification as to the Calder and Hebble navigation, that relates to the navigation, and not to the interest which the plaintiffs or any one else have in the waters for other purposes. Then as to the navigation, the restriction is against the interference by the defendants without the consent of the Company of Proprietors of the Navigation; but I see no proof of any intention on the part of the defendants to evade that provision; and, on the contrary, it is, I think, proved that they have no intention to interfere with the navigation, without first coming to an arrangement with such Company; and if that be obtained, then the condition imposed by the act would be satisfied, and the general powers would apply. It is also to be observed, that in that case the plaintiffs would be complaining in their own individual rights of an alleged injury to the navigation of the river in which they are interested, in extent, probably, more than others, but in right only as one of the public.

I think, also, the plaintiffs have failed in proving that the substituted road is not "as convenient or as nearly so

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as may be" (which are the words of the act) "to the old road." It is free from some of the objections to which the old road was subject; and as to the width, which is the principal objection relied upon, it appears that there is far from being that difference between the two which the original affidavits represented.

I allude to these points that the plaintiffs may not suppose that they have by their acquiescence lost rights which they originally possessed, although I find in such acquiescence and delay ground for deciding against their present application, which leaves open to them all the remedies, if any, which they might have for damages at law.

The plaintiffs then complain that they were made to pay the costs of the original application. To try the validity of the Vice-Chancellor's order on that point, it is only necessary to consider whether the affidavits on which the injunction was obtained fairly disclosed the case, and stated those facts of which the Court has, on hearing both parties, come to the conclusion that the injunction ought not to continue. Is the evil which has arisen from the injunction having been made, and the expense of having it discharged, to be attributed to the error of the Court, or to the false representation of the case by the plaintiffs? Certainly the latter. The costs therefore were properly given to the defendants, and this motion must be refused with costs.

Between the MIDLAND COUNTIES RAILWAY COMPANY - - - - - Plaintiffs,

and

L. WESCOMB, M. J. WESCOMB, and C. WESCOMB, infants, and J. WESCOMB - - Defendants.

1840.

19th June.

A landowner contracted with a Railway Company to sell to them a certain portion of his land; he died; and the legal estate in the lands in question descended to infants:—*Held*, that inasmuch as the vendor, knowing that the purchasers would take that portion of his lands, had suffered the legal estate therein to descend to infants, he had thereby occasioned the necessity for a suit, in order to procure a conveyance of the legal estate; and that the costs of the suit must be defrayed out of the purchase-money.

THE bill stated the Midland Counties Railway Act (*a*). That J. Wescomb, deceased, was seised in fee-simple of certain lands which are crossed by the line of the railway. That an agreement in writing was, on the 3rd of April, 1838, made between the said J. Wescomb and the Company, by their respective duly authorized agents, whereby it was agreed that the sum of money which the said J. Wescomb was to receive of the Company for the value of the lands to be taken for the purposes of the railway, and for compensation for injury to other lands, should be fixed and determined upon by J. Parkinson as a mutual referee. That J. Parkinson made his award, by which he adjudged that the Company should pay to J. Wescomb, for the value of the land to be taken for the railway, the sum of £225, and also £22 for land required for making a tunnel to pass under land belonging to J. Wescomb, the said J. Wescomb to have the property in the herbage over the tunnel, and the right to plant trees thereon. That the Company prepared a draft conveyance for the purpose of effecting the said award, which was sent to the solicitor of J. Wescomb. That before the same was approved of on the part of J. Wescomb, he died, leaving the three first-named defendants, who are infants, his co-heiresses. That the other defendant is the widow and administratrix of J. Wescomb. That the infant co-heiresses are unable to make a

(*a*) *Ante*, p. 128.

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conveyance of the land, save under the decree of this Court. The bill prayed a declaration, that the award ought to be specifically performed, and that the sum of money awarded for the purchase of the land might be paid to the defendant the administratrix, and that the other defendants might be declared to be trustees of the pieces of land for the Company, within the meaning of the 11 Geo. 4 & 1 Will. 4, c. 60, and, upon payment of the consideration monies, might be decreed to convey the same to the Company, and for general relief.

The answer of the defendant, the administratrix, stated, that the draft conveyance was not sent by the Company until a considerable period subsequent to the award, and that such delay was not in any manner caused either by J. Wescomb or his solicitor.

The other defendants put in the usual infant's answer. The cause was heard as a short cause.

Mr. *J. Parker*, for the plaintiffs.—The death of J. Wescomb has occasioned the necessity for this suit, in order to obtain a conveyance of the legal estate to the Company by the infants. The expenses of the conveyance must be borne by the Company, but the costs of the suit ought to be paid out of the purchase-money. *Prytharch* v. *Havard* (*a*).

Mr. *Hallet*, contrà.—The 15th section of the Railway act has imposed on the Company the obligation of paying all the expenses relating to conveyances of lands. This is a rule obligatory on them as purchasers of land, which distinguishes this case from ordinary sales and the rules regulating them. The right to the soil over the tunnel was reserved to J. Wescomb, but the draft tendered was not conformable to the award in that respect; the Com-

(*a*) 6 Sim. 9.

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pany, by not tendering a proper conveyance, have themselves occasioned the suit. *Ex parte Cant* (*a*), *Ex parte Richards* (*b*).

The VICE-CHANCELLOR.—The 15th section of the act has no application; that section applies to the costs of the actual contract and conveyance; but the question before me is as to the costs of this suit. Mr. Wescomb agreed, that, instead of the usual jury process, the value of the land should be ascertained by an arbitrator. It is quite clear that Mr. Wescomb was aware that the Company would take the land, and he ought therefore to have taken measures to prevent the legal estate in the lands, which from the time of the contract in equity belonged to the Company, descending to infants. If he had merely taken the precaution of devising the estate to some person in trust to convey to the Company, there would have been no necessity for this suit. This he should have done as soon as he knew that the land would be taken. The Company must pay the expense of the actual conveyance, but their costs of the suit must be paid out of the purchase-money, for Mr. Wescomb has himself caused the necessity for this suit. If it is necessary that the conveyance should be settled by the Master, any extra expense arising from that will fall under the same rule as that in regard to the costs of the suit.

(*a*) 10 Ves. 554. (*b*) 1 J. & W. 264.

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AFFIDAVITS.

The following rule of practice, as to allowing affidavits to be read in opposition to a motion to dissolve an injunction, will be found useful with reference to the cases forming the subject of these Reports.

The VICE-CHANCELLOR this day said, that, where notice is given of a motion to dissolve an injunction obtained *ex parte*, and the motion, on being called on, is ordered to stand over at the request of the plaintiff, the Court will not, in future, allow any affidavits to be read at the hearing of the motion, unless they were filed before ten o'clock of the morning of the day on which the motion was allowed to stand over. His Honor added, that he had mentioned to the Lord Chancellor that such was the rule to which he proposed in future to adhere, and that his Lordship had stated his approval of such a practice.

Dec. 24th, 1840.

COURT OF COMMON PLEAS.

In Trinity Term, 1840.

THE SOUTHAMPTON DOCK COMPANY *v.* RICHARDS.
THE SAME *v.* ARNETT, &c. &c.

1840.
May 30th.

DEBT.—The declaration stated, that the defendant on &c., he then being a proprietor of divers, to wit, forty shares in the undertaking mentioned in a certain act of Parliament, (6 Will. 4, c. xxix, local), intituled "An Act for making and maintaining a Dock or Docks at Southamp-

By the Southampton Dock Act, 6 Will. 4, c. xxix, it is provided (sect. 84), that in an action for calls, in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the Company is by this act directed (sect. 89) to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein. Section 89 requires the Company from time to time to cause the names, additions, and places of abode of the persons from time to time entitled to shares, with the number of their shares and amount of subscriptions paid thereon, and the proper number by which every such share shall be distinguished, to be entered in a book to be kept by the secretary.

Held that the provision as to the making the entries is only directory, and that an omission or irregularity in the entries in the book, relating to other shareholders, does not render the book inadmissible against the defendant, as being the book kept under the act.

And that it is not necessary that the entries should be made by the secretary's hand.

Section 63 directs, that the orders and proceedings of every meeting of the Company shall be entered in a book to be kept for that purpose, and shall be signed by the chairman at such meeting; and when so entered and signed, as also the minutes or entries hereinafter (sect. 75) provided to be kept, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, &c., without proof of such meeting having been duly convened, or of the persons making or entering such orders, &c. being proprietors or directors of the Company. Section 75 provides that the directors shall keep a regular minute and entry of the orders and proceedings at every meeting of directors, which shall be signed by the chairman at each respective meeting. *Held* that the signature of the minutes by the chairman of the meeting, when presiding at the subsequent meeting, is sufficient.

And that the terms "directors," and "court of directors," are equivalent, so that the calls may be made by a court of directors, and a general meeting is not necessary for that purpose.

The 84th section giving the form of declarations for calls, and the proofs necessary, provides that the Company shall recover what shall appear due, *including interest at £5 per cent:—Held*, that it is not necessary to insert a count for interest, which may be added by the jury to the debt claimed for the calls.

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ton," was indebted to the said Company in £100 for divers, to wit, one call of 2*l.* 10*s.* upon each of the said shares in the said undertaking belonging to the said defendant, whereby an action hath accrued to the said Company, by virtue of the aforesaid act of Parliament, to demand and have of and from the said defendant the said sum of £100 above demanded. Breach. Plea, *nunquam indebitatus.*

The cause was tried before *Erskine*, J., at the sittings at Guildhall in Michaelmas Term, 1839. To prove the proprietorship of the defendant the clerk of the Company produced a book kept by the secretary, in which the name, addition, and residence of the defendant were inserted, with the number of shares held by him, the numbers by which they were respectively distinguished, and the amount paid upon each. It appeared, upon inspection, that, to the shares of certain proprietors entered therein, no registered numbers were assigned. The witness stated the practice of the Company, prior to obtaining the act of incorporation, to be, that upon the proprietor paying to the bankers the deposit upon the shares allotted to him, they gave him a receipt, which was afterwards exchanged at the dock office for a scrip certificate of the number of shares paid upon, the shares being numbered in the order in which the scrip certificates were issued. After the act passed the proprietors were required to bring in their scrip certificates to be registered, upon which new numbers were assigned to them, in the order in which the scrip certificates came in, and a certificate of registry was issued in exchange for each scrip certificate; that in those instances in which no registered numbers were affixed to the shares, the scrip certificate had not been brought in as required.

In order to prove the calls were duly made, the same witness produced the minute book in which the entries were made of the proceedings of the courts of directors. It appeared that the practice was for the chairman to take down the minutes in rough notes, which were afterwards reduced

into form, corrected by him, and then fairly transcribed by the witness into the book. The proceedings so transcribed were produced at the next meeting, and signed by the chairman at that meeting. Mr. Heathfield was the permanent chairman of the Company, and presided at the two meetings referred to in the following entries:—

"Southampton Dock Company.
"Court of Directors, Monday, 18th July, 1837.
"Resolved, that a call of 2*l.* 10*s.* per share be made, payable on such day in the course of the following month of August as shall be determined upon at a future meeting of the Court.
"R. HEATHFIELD, Chairman."

"Southampton Dock Company.
"Court of Directors, Tuesday, 25th July, 1837.
"Resolved, that the resolution of the Court, held on the 18th instant, be altered from a day in the month of August to the 8th of September next, for the payment of the call; and that a call of 2*l.* 10*s.* per share, payable on the 8th of September next, be made accordingly.
"R. HEATHFIELD, Chairman."

It was proved that the original notices of the call were signed by the secretary, and advertised in the newspapers as required by the act.

It was objected, for the defendant, that neither of these books was receivable in evidence, the requisites of the statute as to keeping them not having been complied with; and the signature of the chairman not having been attached at the meeting; and that the plaintiffs could not recover interest without a count in the declaration for that purpose. These objections were overruled, and the jury found a verdict for the plaintiffs for 111*l.* 10*s.*

The second action was tried before *Coltman*, J., at the sit-

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tings at Guildhall in Hilary Term, 1840. It then appeared that several additions had been made to the book, (to meet some of the objections made to it at the previous trial), but the entries as to the defendant Arnett were in precisely the same form as before, and in the handwriting of the witness, except that the numbers 4610 to 4629 had been inserted since November.

Name.	*Addition.*	*Residence.*	*Numbers of Shares.*	*Numbers of those Shares.*	*Amount paid on each share.*
John Arnett	Agent.	Custom-house, London.	20	From 4610 to 4629 inclusive.	2*l.* 10*s.*

In some few instances there was no residence given. It was proved that this book was kept by a clerk, who acted under the secretary, and made entries in the minute-book according to his directions. The same objections were taken as in the former case; and also that the residence was improperly entered; that the calls ought to be made by the directors at large, and not the court of directors; and that the register book had not been kept by the secretary. A verdict was taken in this case for £50, and interest. And in the following term, *Talfourd*, Serjt., for Richards, having obtained a rule *nisi* for a new trial, and *Bompas*, Serjt., for Arnett, a rule *nisi* to enter a nonsuit—

Sir *T. Wilde*, Solicitor-General, *Kelly*, and *Dasent*, now shewed cause (*a*). The first objection is, that the register book was improperly received as evidence of proprietorship; Secondly, that the minute-book was improperly received; and, Thirdly, that interest is not recoverable under this form of declaration.

The first objection depends on the 84th section (*b*),

(*a*) Before *Tindal*, C. J., *Bosanquet*, *Maule*, and *Erskine*, Js.

(*b*) Section 84 enacts, "That in any action to be brought by the said Company against any proprietor of any share in the said undertaking, to recover any money due and payable to the said Com-

which makes the register book evidence, and the 89th (*a*), which gives directions how it is to be kept. In order to

pany, for or by reason of any call made by virtue of this act, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of so many shares in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for so many calls of such sums of money upon so many shares belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matters; and on the trial of such action, it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such shares in the said undertaking as such action is brought in respect of, and that such calls were in fact made, and that notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call, or any other matters whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest, computed as aforesaid (£5 per cent., s. 83), in respect of such calls, &c.; and in order to prove that such defendant was a proprietor of such shares in the said undertaking as alleged, the production of the book in which the secretary of the said Company is by this act directed to enter and keep a list of the names and additions and places of abode of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

(*a*) Section 89 enacts, "That the said Company shall, and they are hereby required, from time to time to cause the names of the several corporations, and the names and additions and places of abode of the several persons who shall be from time to time respectively entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to hold, and the amount of subscriptions paid thereon, and also the proper number by which every such share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the secretary of the said Company, and that every proprietor of the said undertaking, or agent, &c., may at all convenient times have recourse to and peruse the same gratis, and may demand and have copies thereof, or of any part thereof, paying to the said Company at and after the rate of 6*d.* for every 100 words so to be copied; and if any such secretary of the said Company shall refuse to permit any such proprietor, &c., to peruse such books at all convenient times, or refuse to make such copy within a reasonable period, at the rate aforesaid, he shall for every such offence forfeit and pay the sum of £5 for the benefit of the said undertaking."

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prove the defendant a proprietor of shares, a book was produced by a clerk of the Company acting under the secretary, (who, being a shareholder, was not a competent witness); that book was principally in the handwriting of the witness, and contained the entry of the defendant's name, with the number of his shares, therefore it was receivable to prove him a proprietor of shares, and the number he held. It is objected, that every direction of the act is a condition precedent to making calls; but section 84, which gives the right of action, states what shall be contained in the declaration, and what proved. It gives a form which is material, because it not only states affirmatively what shall be proved, but that nothing else is necessary—nothing is left to inference: then, having stated what is the form and proof required, it next gives the mode of proof, that is, the production of the book. It may be observed here, that there is a slight mistake in the framing of this clause, which supposes something to have been done by the act which has not; for there is no book in which entries are required to be made by the secretary. Section 89 speaks of causing to be entered in a book kept by the secretary; and it is with reference to that book that, section 84 says, that "the production of the book in which the secretary is directed to make the entries shall be sufficient." The question, then, is, whether the book which contains apt and proper entries to prove what is necessary to maintain an action, is sufficiently identified as the book in which certain entries are directed by the statute to be made. There is no doubt that it is the book devoted and appropriated to the purpose of receiving the entries under section 89. That book contains the name of the defendant, as proprietor—as such when the call was made—and of a certain number of shares. That is all that is required to be proved by that book, and identifies it as of the clause. This being a book made up after the act passed, with a

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view of shewing the whole body of proprietors, and also the number of shares which they in reality possess, it would, of course, be a work of time to make it up. The scrip receipts are to be brought in; the custom is, that certain documents are given by the bankers, acknowledging the money paid; these receipts are brought to the office and exchanged for a scrip certificate, which again ought to be taken to the office and a register certificate procured for it. The 84th section was framed to give effect to actions for calls, and is therefore more to be attended to than others which only bear collaterally on that point.

Another objection to this book was, that certain names are written in it, against which there are no numbers of appropriation, the entry being perfect as to the defendant, but not as to some other persons. There is no evidence that these persons were not disabled by death, or one of the many conditions necessary to entitle them to the appropriation; the legislature could have no object in saying the whole affair should fall to pieces because one out of the number was not entitled. The 84th section is directed to a particular object, to shew that a proprietor holds a certain number of shares; the omission of his name, addition, or abode, or of the numbers by which the shares are distinguished, are not conditions precedent to a party becoming proprietor,—nor to his paying calls, or being liable for them; if it were, it would go to the root of the Company, for an omission in one instance would vitiate the whole.

In the case of each of these defendants there were numbers attached, but in Arnett's case his name stood without any registered number, having only the scrip number; but afterwards some were attached, which are objected to as being too late. If an act says a book is to be kept, and describes that book; and if, in another section, there is a direction that certain entries shall be kept;

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if that book contains some, but not all, that is not to prevent its being received: there are no words in section 85 excluding the book for not containing every entry which may be required for the purposes of the Company. The 89th section is merely directory, and does not affect any right or title, if not complied with; it will therefore be sufficient, if proper as to the particular entries for which it is required; and it never could have been intended that this great object should be defeated by a non-literal compliance with these provisions; that is, by the omission of a name, addition, or place of abode; which, however convenient, are so minute as to shew the statute is only directory. [*Tindal*, C. J.—In every case the contest might be put on another person's description, which the plaintiff might not be able to meet.] Exactly so: then they say, in Arnett's case, the Custom-house is not a residence; these are purely matters of regulation, and looking at the various decisions as to the directory and imperative words of statutes, it is perfectly clear this is only directory. In *Rex* v. *The Justices of Leicester* (*a*), *Lord Tenterden*, C. J., gives the rule, that, if it had been intended to make the statute imperative, there would have been negative words. [*Maule*, J.—You need not go so far as to say the act is not imperative, but that one man is not affected by an omission as to another; he might have a right to object to the number not being against his own name.] It might be imperative on a proper occasion, and by proper means, but not as to the existence of the Company. In *Rex* v. *The Inhabitants of Birmingham* (*b*), the statute 4 Geo. 4, c. 76, s. 16, requiring the consent of the parents or guardians to the marriage of a minor, was held to be directory only. So, also, were the ship register acts, (26 Geo. 3, c. 60, and 34 Geo. 3, c. 68), requiring certain acts to be done by the public

(*a*) 7 B. & C. 6; 9 D. & R. 772.

(*b*) 8 B. & C. 29; 2 M. & R. 230.

officer. *Heath* v. *Hubbard* (*a*). It is therefore submitted, that this is the book required by section 84, and that the second objection does not vitiate it.

To the calls, then, it is objected, that the power to make them was given to the directors, that is, on general principles, to a majority of the whole body, and that here they acted in another capacity. There is no ground for the distinction between "directors" and "court of directors", the act uses the words without distinction; the effect is to provide that every meeting of directors is a court of directors; they can only act at a meeting, and if they do so, it is a meeting of the court of directors. Section 72 applies to the time and manner of appointing a committee at the meetings, to whom they may delegate all their powers, except that of making calls. That is conclusive to shew that every meeting is a court. Section 77 gives the court of directors power to purchase lands; and the 78th speaks of "directors," omitting "court."

The second objection is, that the minute-book is not receivable as evidence of the calls made, because it was not signed at the meeting at which the resolution was made. To this there are two answers: 1st. It is a misapprehension of the statute (*b*), to suppose that it requires the book

(*a*) 4 East, 110; 4 Esp. 205.

(*b*) Section 66 enacts, "That the orders and proceedings of every meeting, as well general as special, of the said Company, shall be entered in some book or books, to be provided and kept for that purpose, and shall be signed by the chairman of such meeting; and such orders and proceedings, when so entered and signed, and also the minutes or entries hereinafter (section 75) provided to be kept of the orders and proceedings of the directors, when signed as hereinafter ordered, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all courts and before all judges, justices, and others; and that without proof of such meeting having been duly convened, or of the persons making or entering such orders or proceedings being proprietors or directors of the said Company, as the case may be.

Section 75, "That, at the first meeting of the directors which shall be held next after the passing of this act, or at some adjourn-

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to be signed at the meeting; it only requires that the chairman at the meeting should authenticate the proceedings by his signature. 2ndly. For the purposes of the act it *was* signed at the meeting. There was a permanent chairman; it was his duty to make rough notes, which were afterwards expanded, entered in a book, read over at the next meeting, and then signed by the chairman; so that every resolution was put twice to the directors. If this call was good made on the 25th of

ment thereof, and at the first meeting of directors which shall be held next after the first appointment of the said directors, under the provisions herein contained, or some adjournment thereof; and in subsequent years, the first meeting of directors after a new election of directors, or at some adjournment thereof, the directors present at such meeting of directors shall choose out of the directors of the said Company for the time being a chairman and deputy-chairman of the said directors: Provided always, that when or so often as the chairman or deputy-chairman of the directors to be chosen by virtue of this act shall die, or resign, or become disqualified, or otherwise cease to be a director, it shall be lawful for the said directors, in like manner at the meeting to be held next after such vacancy, to choose some other of the said directors to be their chairman or deputy-chairman; and every such chairman or deputy chairman so to be chosen as last aforesaid to fill such vacancy, shall continue in office so long only as the person in whose place or stead he may be so elected would have been entitled under the provisions of the act so to continue in office if such a vacancy had not happened; and it is hereby declared, that in all courts of directors, the votes and resolutions of the majority of the directors present, inclusive of the chairman or deputy-chairman or other director presiding at such meeting, and who shall be elected for that purpose at such meeting, in case both the chairman and deputy-chairman are absent, shall be binding; and that in case of an equality of votes, the chairman or deputy-chairman or other director presiding at each respective meeting shall have a casting vote, besides his own vote; and that the said directors shall keep a regular minute and entry of the orders and proceedings at every meeting of the said directors, which shall be signed by the chairman at each respective meeting; and that the said directors shall, if required, from time to time produce such minutes to the half-yearly general meetings, and to the special general meetings of the said Company, and shall in all things obey their orders and directions."

February, without referring back to the meeting of the 18th, this objection fails. The 63rd section says, "when so entered and signed," which contemplated that the entry *might* not be contemporaneous with the meeting. The words "as hereinafter directed" were not intended to give any particular force to the words "at the meeting," but only that, at the time of producing the book, the entries should be there, and signed by the chairman. [*Bosanquet*, J.—The words "at the meeting" would have been probably transposed and put before the words "by the chairman."] The ease with which that might have been done is a reason for not ingrafting another interpretation on the words. The earlier part of section 75 gives the meaning of the word "at." [*Maule*, J.—The word chairman, in the last part, seems to be equivalent to chairman, deputy-chairman, or other director, presiding at each.] The act contemplates either of the persons presiding; therefore, reading these together, and bearing in mind the general course of business at public meetings, it is evident that this statute is in all respects substantially complied with.

Thirdly, the act having directed the declaration to be in a particular form, and that interest shall be recoverable, it forms part of the debt to be recovered. If it did not, the jury might have given it in the shape of damages for the detention of the debt, and it is immaterial in which of the two ways it is recovered.

Bompas, Serjt., (for Arnett), and *Talfourd* Serjt., (for Richards), contrà.—The duty and liability in these cases are reciprocal. In Arnett's case, no numbers were appropriated when this action was commenced; and they do not affect to say, they have a signature of his, but a bankers' receipt of *some* money from *some* persons. If the numbers were originally appropriated to certain individuals, it might be found by the defendant, on coming

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into Court, that they had been given to others, though he might be prepared to prove them paid; therefore, if this book has not been made up according to the act, it cannot be received in evidence. Here is no book having the numbers appropriated under the act, not even substantially. The same objection applies as to names and abodes: Arnett could not be bound by a notice left at the Custom-house; and it must, by section 85, be left at the place mentioned in the list. As to numbers and residences, the defendant may rely on the absence of others as well as his own: the great objection is, that not being a book kept fairly, it cannot be received. It does not mean a book directed to be kept according to the provisions of an act, but that the directions are obeyed; directory means that they cannot use it unless it is so kept: there is no punishment for not doing it; but they must prove their case *aliundè*.

The next book put in is that referred to in sections 63 and 75. The word "at" is twice repeated, and chairman means chairman *at the meeting*, and is complete without the addition of those words, which would have been omitted altogether, if it had not been intended it should be done at the time. The signature of the chairman is merely an affirmation that such things were done at the time: he ceases to be chairman when the meeting ceases to exist. These words are used to avoid equivocation; when the intention of them is to control a general right, they cannot be read too strictly.

As to the directors, the 74th section, which establishes the court, gives a strong answer as to them: the court may consist of three; it is quite clear, that, for many purposes, it might be right to have six; they cannot limit to less than three, but they may have more: the consent of the majority for the time being is required; therefore, all, or at least a majority, must be present. Section 54 says, "the directors, or any *four* of them," may call a special

general meeting; which shews that there is a marked difference between the expressions.

As to interest, this is an action of debt to recover £50; they say, under that, they can recover more than £50; they have a mere legislative right to recover at all, and they were bound to claim for money due for calls and interest: they cannot recover it on these pleadings as damages, which, if they had claimed properly, they might have done. They have two modes of bringing their action: they may have a separate count for interest, or add it to the money due for calls; but they cannot bring an action as for a debt of a specific amount, and upon the count in which the debt is claimed recover more than the amount of that debt. So many interests and claims being affected by these acts, it is highly necessary that they should be most carefully protected.

TINDAL, C. J.—In this case, three objections have been made to the right of the plaintiffs to retain their verdict: First, as to the admissibility of the register-book in evidence; Secondly, that the minute-book was not receivable to shew that the calls were made; and, Thirdly, as to the allowance of interest in the calculation of damages.

The first point depends upon the proper construction of the 84th and 89th sections of the act. The 84th states what shall be the form of the declaration, if the Company sue, and then what shall be evidence. [His Lordship read the sections.] The objection taken to the admissibility of the register-book is, that the entries were not made in it from time to time, but at a subsequent time; and in one case, that numbers were assigned to a proprietor with which he had had nothing to do. We must, therefore, refer to section 89, to see whether this register, when produced, is virtually and substantially a book answering to the description of that required by that

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section. There is a marked distinction between the directory and essential parts of a statute: that distinction is well pointed out in *Rex* v. *Loxdale* (*a*), where Lord *Mansfield*, C. J., says, "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory." So, here, although there may be some evidence of irregularity in making some of the entries; yet still, if the book has been kept honestly, and *bonâ fide* entries have been made from time to time, (it cannot be made up and produced at every moment), it seems to me to be, in substance, the book "directed to be kept." Great inconvenience would result in many instances if we were to hold the plaintiffs to the strictest proof; for if the book in all cases were to be rejected as evidence, if not quite perfect, as for one name, or one number, being incorrect, to which the action before the jury had no reference at all; a defendant, finding out that defect, might bring forward cases which the plaintiff might be unable to meet by evidence or explain. But it is to be observed, that this book, although made evidence, is only *primâ facie* evidence. The defendant, on payment of a small sum, was entitled by the act to a copy of any entry in that book, which would enable him to ascertain whether he was properly entered; and I think that the balance of convenience is on the side of allowing such a book to be evidence.

The second objection is, as to the calls being made; and this resolves itself into two distinct grounds: 1st. That they were made, not by the general body, but by a court of directors; 2ndly. Supposing them properly made, there was no signature of the chairman *at* the meeting. The first will depend on the construction of section 76, connected with section 74. The 76th, which gives power to make calls, says, that "the directors shall have full power

(*a*) 1 Burr. 447.

from time to time to make such calls of money from the several subscribers to and proprietors for the time being of the undertaking, not exceeding in the whole, including the sum already paid in respect of such shares, the sum of £50 on each share, as they shall from time to time find necessary for the purposes of the Company, so that no such call shall exceed the sum of £5 upon each share in the undertaking &c., and there shall be an interval of three calendar months at least between every two successive calls." The 74th section enacts, "That the directors, for the time being, of the Company shall meet together, at the office of the Company, once at least in every calendar month, and at such other times as they shall think proper, and at such other times as they shall be convened as hereinafter mentioned; and each of such meetings shall be styled a 'a court of directors;' but no meeting of directors shall be deemed a court competent to enter and determine upon business, unless at least three directors shall be present." It is contended, that there is a marked distinction in this section between individual directors and a court of directors. We must therefore, see whether there is any such distinction. When three or four meet, they become a court of directors *instanter*; and it seems to me that it would be impossible to say, that, if they, as directors, could perform a given act, they could the less do it as a court. By the same section, "If, on the day appointed for such meeting, a sufficient number of directors to constitute a court shall not attend, the meeting shall be adjourned to the next or some subsequent day by the directors then present; but if none be present, then by the secretary of the Company, or such other person as shall attend in his place; and that any director shall be at liberty to call an extraordinary meeting of directors, upon such notice, and in such manner, and to consist of at least such number, not being less than three, as shall from time to time be provided by the by-laws of the Company or the orders of the court

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of directors." It has been stated, that it would require a larger number to perform some acts authorized by the statute; but I cannot see this, except in section 54, where a greater number is required for calling a special general meeting of proprietors. And, looking at section 72, I find the words "directors" and "court of directors" are used indiscriminately; and I think, therefore, there is no real distinction between them.

As to the objection, that the book was not properly signed, I think it would be much safer if parties would use all diligence to follow to the letter the instructions of the act; but still the question is here, Have they been substantially complied with? The course seems to be, first, that the chairman makes rough minutes of what passes at the meeting; these are afterwards reduced into a regular form by the secretary, entered in the book, and signed at the next meeting by the person who had previously acted as chairman. Is this a substantial compliance with the 75th section, which says, "that the said directors (which seems to mean sitting as a court) shall keep a regular minutes and entry of the orders and proceedings at every meeting of the said directors, which shall be signed by the chairman at each respective meeting?" It is alleged, that, by this clause, it is made a condition precedent to the admissibility of these entries, that they shall be signed by the chairman *at* the meeting. I think, with my Brother *Maule*, that the words probably mean only a compendious way of expressing "the chairman, deputy-chairman, or other director presiding." Independently of that, I think, if there is no reason to doubt the authenticity of the signature, it is not necessary that it should be done at the meeting. Section 63 puts this beyond doubt; speaking of the copies of the minutes of the orders, it says, "they shall be deemed *original*;" if they were signed at the time, they would be so without any act of the legislature: it would, therefore, seem from this, that there is no such necessity.

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The third point, as to interest, has been disposed of in the argument. It seems to me, that where a statute gives the action of debt, it gives that which is ancillary to it, and the consequence of such an action, which is damages for the detention of the debt; the party having claimed damages for the detention, and the statute giving damages *eo nomine*, I see no objection to interest being recovered in the mode in which the law gives it. I am of opinion, therefore, that these rules must be discharged.

BOSANQUET, J.—I also think these rules must be discharged. The books of the Company are produced, to establish the fact of the defendant being a proprietor, and that the calls were duly made. I find by section 84, that in case of an action being brought, the manner of declaring is provided for, and what only it is necessary to prove. Now, when the Judge, at the trial, admitted this in evidence, he admitted it under the statute, to shew that defendant *is* a proprietor. It has been objected, that the time of his being so is material; but it seems to me that does not affect the point. In a question, whether he *was* or *was not* a proprietor, it is one step to shew he *is*; they might afterwards have gone further, and proved the previous period. Then, it is said, the book could not be received, because it was not kept by the secretary in the manner prescribed by the statute: "kept" does not mean that he is to make every entry in it; all that is required is, that it should be under his care and control, which it was here; for his clerk produced it, who alone could be a competent witness. If the objection be good, that the names are not all entered correctly, any one person's name, number, or residence, being incorrectly stated, would, render the book inadmissible in evidence. I cannot think that the absence of other names than the defendant's, can affect the authenticity of the book as to him.

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Then it is objected, that, although the proprietorship be proved, the calls were not duly made,—only by a court, not a majority of the directors; but I think that by the word "directors," the statute refers to that court of directors appointed for the management of the affairs of the Company. In referring to the different clauses, I see, in the 67th, "the business and concerns of the Company shall, from and after the first general meeting, be carried on under the management of sixteen directors." Now, this is not a clause which constitutes a court of directors, but speaks of them as to do things which it can hardly be contemplated were to be cast upon the whole body. Then section 74 provides, that the directors of the Company shall meet together, at the office of the Company, once in every month, and at such other times as they shall think proper, &c.; and that each of such meetings shall be styled a court of directors, at which three must be present. Section 76 directs, that the calls shall be made by the directors. And section 78 enacts, that the said directors shall have full power and authority to direct and employ the works and workmen, and regulate the use of the dock or docks, and the amount of rates, &c. It is impossible to say, that all these minute acts are to be performed by the majority. It seems to me, therefore, that where the word "directors" is used (except in particular cases, where a certain number is expressly required), it means the court of directors.

As to the signature of the chairman at the meeting, as provided by section 75, it cannot but be supposed that the expression "chairman" is only a short form to designate the former more general expressions. If so, this resolution has been authenticated by the signature of the person who presided at the meeting, and, therefore, the terms of the act have been complied with. As to the recovery of interest, I entirely agree with the Lord Chief Justice.

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MAULE, J.—I also am of opinion, that these rules must be discharged. The object of the 84th section was, that very little evidence should be required, and very little expense incurred, in order to compel persons to pay up their calls; otherwise, it would have been necessary to have recourse to difficult and expensive proceedings in each case. I may here, in one word, dispose of the question of interest. The words of the statute are perfectly clear as to what is necessary to be stated. It then says, the Company shall be entitled to recover what shall appear due, including interest; and that, however contrary to legal form it might be; which it is not, for, if a party is indebted, he is liable to damages for the detention of the debt, which damages may be calculated by the amount of interest.

As to the proof of the defendant being proprietor, the objection, that the book proves he *is* not *was* one, was not taken at the trial; the objection there being, not to the effect of the entry, but the admissibility of the book; and for a good reason; for, if so, it would have been left to the jury to say whether he was a proprietor before; and it might have been shewn that he had acted as such by attending meetings, &c., from which any jury would have inferred that he was. Whether the book was admissible, as answering the description of the book directed to be kept, must be referred to section 89. Then, it is said, the book should be in his handwriting, because he is directed to keep it. It is not necessary to imply that: he makes an entry if he causes it to be made; and no act which requires that entries should be in writing, makes it necessary they should be in one man's hand. Then, it is objected, that this book is not complete as to some names and additions: I do not think the statute contemplated a book in a state of perfection; for changes must often have been made before correct information was procured. Section 84 requires the production of the book mentioned in section 89; and that book, if *bonâ fide*

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kept under that section, I have no doubt answers the description.

There may be some doubt, though I confess I entertain none, as to whether the requisites of sections 63 and 84 are sufficiently complied with as to the calls made. I apprehend, that, when a man is duly shewn to be a proprietor, he ought, at the same time, to pay up his calls. Calls *in fact* made, means that if made, and notice be given in the newspapers, a party shall not wait to take advantage of any irregularity at the trial. If he thinks, from any internal act of the directors, the calls will be revoked, he should endeavour to rectify the error, and procure such revocation; but if they are proved to have been advertised in the London and provincial newspapapers, it is sufficient evidence of calls made; and I doubt whether, in itself, the entry in the book is not sufficient evidence of a call *in fact* made. It seems to me, the object of the statute is, when the book actually kept by the Company, under section 75, is produced and signed, all objections are excluded; if the order-book is signed by the person who acted as chairman, the Company would not be allowed to say it was not their proceeding, because not signed by *the* chairman; neither must the proprietors be allowed to say so. But if the book had not been kept with propriety, under section 75, and I am not satisfied that it was not, it would not necessarily have been excluded under the 63rd. If they could, with convenience, have written out the proceedings at once, as far as I can see, it would exclude all question. It would have been easy for the act to say, it shall be signed "at the meeting by the chairman," instead of "by the chairman at the meeting; and it is quite clear the meeting is competent to do business when the chairman is not there. Nobody can doubt but that the word comprises chairman, deputy-chairman, and person presiding.

ERSKINE, J.—I am of the same opinion. At the trial

of the action against Richards, two objections were taken —1st, Was the defendant a proprietor? 2ndly, Were the calls made? There was no objection as to the effect of the evidence, if admitted. It ha been argued, that the book was not the original book, but evidently one made up since the calls were made, and not by the secretary. It is not directed by the statute, that the entries are to be made by his hand; for, referring to section 89, it says "in a book kept by him:" but suppose that section, taken with the 84th, did imply it, it would only mean that they should be made under his direction: here they were by his personal instruction. It is then objected, that, if kept, it was not kept correctly; which raises the question of the necessity of its being perfect when the calls were made. I see nothing in the act to that effect. Section 84 only says, that the book shall be evidence that the defendant *is* a proprietor. It would be hard to say it should be that he *was*; there is no mention of the time when, and it would be, therefore, unreasonable to put any other meaning on the words than that he *is*. But if the book is evidence for any purpose, the objection is completely answered, and none was made that, if admissible, it would not prove that he was a proprietor; if there had been, they would probably have given some other evidence; and if not, I think it would require some proof, on the part of the defendant, that he was not, to make a jury disbelieve that he was so all along. But that would be an objection to the effect, not the admissibility of the book; therefore, it appears to me that the book was properly admissible.

The second main objection is, as to the production of the minutes; that the word "directors" means directors at large, and that this meeting was merely a court; if so, it may be said this book cannot be received as evidence of what was done by the directors generally. But section 75 speaks of the proceedings of every meeting; and the 63rd says the orders and proceedings of every meeting shall be

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entered; and when so entered and signed, and also the minutes hereinafter provided to be kept when signed, shall be deemed original orders, &c. Here is a book produced, a minute of the proceedings of a meeting of directors signed by the chairman. It is not necessary there should be a larger meeting to make calls, or for any other purpose, unless particularly mentioned, as, in the 54th section. The statute uses the words "directors and court of directors" as identical; if such distinction, as contended by the defendants, could be made, a majority of directors might appoint a committee in the first instance, and then a court of three might dissolve that committee, and create another with additional members.

I quite agree with the rest of the Court, that it is enough that the minutes shall be signed by the person who presided at the meeting, and not *at* that meeting. The act is, in substance, complied with; its object was, that the proceedings should be attested by the president, as having really taken place.

The only other point is, that, the statute having given the precise form of declaration, it is not necessary to superadd a count for interest, but that it may be recovered as damages for the detention of the debt.

Rules discharged.

COURT OF EXCHEQUER.

In Trinity Term, 1840.

THE EDINBURGH, LEITH, AND NEWHAVEN RAILWAY COMPANY *v.* HEBBLEWHITE.

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June 1st.

By a Railway Act, 6 & 7 Will. 4, c. cxxxi. s. 50, it is provided, that in actions for calls,

DEBT.—The declaration stated that the defendant, being the owner and proprietor of forty shares in the above undertaking, was indebted to the Company in £160, for two

it shall be sufficient for the Company to declare that the defendant, being a proprietor of —— shares, is indebted to the Company in £——, upon such shares belonging to the defendant as the case may happen to be, whereby an action hath accrued to the said Company by virtue of the act, without setting forth the special matter, and that on such action it shall be only necessary to prove that the defendant, at the time of making such call, was a proprietor of —— shares in the said Company, and that such call was in fact made, and such notice thereof given as directed by the act. By section 49, the Company are empowered to make calls (as therein provided), and either to sue for and recover the same, or otherwise, in the option of the directors, such proprietor neglecting to pay the same shall forfeit all his shares and interest: Provided always, that no advantage shall be taken of any such forfeiture, until notice thereof in writing shall have been given to such proprietor, nor unless the same shall be declared to be forfeited at some meeting of the Company, general or special, within six months after such forfeiture, which declaration shall, *ipso jure*, be a forfeiture of such shares.

To an action of debt for calls (the declaration being in the general form given by section 50) the defendant pleaded—1st. That he was not nor is indebted *modo et formâ*, &c. 2nd. That no notice of the calls was given as required by the act. 3rd. That the directors did not appoint any time, manner, or bank for payment. 4th. That the defendant, having neglected to pay his calls, the said shares were declared by the directors to be forfeited, and the said directors then exercised and declared their option that the same should be, and they were, forfeited; of which the defendant had due notice, and acquiesced therein. 5th. That the action was commenced after sale of the shares by the defendant, without his having paid the calls thereon, whereby the shares became forfeited, of which the plaintiffs had notice, and the said forfeiture was duly ratified and declared in the manner directed by the act. The four last pleas concluded with a verification. Special demurrer to the four.

Held, that the allegation of notice, being one of the facts required by the act to be proved by the plaintiffs, must be taken to be impliedly contained in the declaration; and, therefore, that the 2nd and 3rd pleas were bad for not concluding to the country, being a denial of a fact so impliedly averred.

And that the 4th and 5th pleas were bad for not shewing that the shares were declared forfeited at a general or special meeting of the company, as provided by the act.

Semble, that the plea of *nunquàm indebitatus* puts in issue all the matters required by the statute to be proved by the plaintiffs in such action.

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calls of £2 each on the said shares, according to the general form given by the act of Parliament, 6 & 7 Will. 4, c. cxxxi.

Pleas.—1st. That the defendant was not, nor is, indebted in manner and form, &c.

2nd. That no notice of the said respective calls in the said declaration mentioned, or any part thereof, was given in manner and form as required in and by the said act of Parliament.—Verification.

3rd. That the directors did not appoint any time or times or manner for the payment of the said calls or any of them, nor any bank or bankers, at which or to whom the same or any of them might or were to be paid, as in and by the act in that behalf directed.—Verification.

4th. That before the commencement of this suit, to wit, on the 18th day of December, 1839, by reason of the defendant, as such proprietor as aforesaid, having neglected and refused to pay his rateable and proportionable part and share of money called for in respect of the said respective shares, according to the said act of Parliament, being the calls in the declaration mentioned, for the space of two calendar months and more theretofore elapsed after the time in that behalf fixed for payment thereof, the said shares in the declaration mentioned were and each of them was, in pursuance of the provisions of the said act of Parliament in that behalf, declared by the directors of the said Company to be forfeited, and the said directors then exercised and declared their option, according to the said act of Parliament, that the same should be forfeited, and the same respectively, to wit then, became and were forfeited; of which the said defendant, to wit then, had due notice according to the said act of Parliament and the provisions thereof, and, to wit then, assented thereto and acquiesced in the said forfeiture.—Verification.

5th. That this action was commenced after a certain sale and transfer of the said respective shares theretofore

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made by the defendant, the then proprietor thereof, without his having paid or discharged divers large sums of money amounting in the whole to a large sum of money, to wit £100, which had theretofore and before such sale and transfer been duly called for; upon each of which said respective shares there was, at the time of such sale and transfer, a large sum of money, part of the said sum of £100, respectively due, and that such sale and transfer was made after the passing of the act of Parliament in the declaration mentioned, and before the passing of another act of Parliament concerning the said Company (passed on the 1st day of July, 1839) to wit, on the 1st day of September, 1838, whereby and according to the said first-mentioned act of Parliament, the said shares became and were forfeited, of all which premises the plaintiffs, to wit on the said 1st day of September, 1838, had notice, and the said forfeiture in this plea mentioned was, to wit then, in all respects duly ratified and declared in the manner in the said first-mentioned act of Parliament in that behalf directed.—Verification.

Special demurrer to the 2nd, 3rd, 4th, and 5th pleas, assigning as causes of demurrer to each plea, "that it amounts to the general issue, and ought to have concluded to the country, and is neither a denial, nor a sufficient nor proper confession and avoidance of any matters in the declaration mentioned," &c. and, in addition, to each of the 4th and 5th pleas respectively, "that it is an informal and improper denial of the averment in the declaration, and that the plea does not state that the said shares were declared to be forfeited at any meeting of the said Company, general or special, after such forfeiture was made." (a)

(a) By the 6 & 7 Will. 4, c. cxxxi, s. 49, it is enacted, "That the said Company shall have power, from time to time, (amongst other things) to make such call or calls of money, from the present or any future proprietors, their heirs, &c., according to the amount of their respective interests, shares, and subscriptions, already belonging to or subscribed

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Cowling, in support of the demurrer. (*a*)—All these pleas amount to the general issue, and are bad, nor do they either

(*a*) Before Lord *Abinger*, C. B., *Alderson*, *Gurney*, and *Rolfe*, Bs.

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for, or hereafter to belong to or be subscribed for by him, &c., for the purposes of this act, as the directors of the Company shall from time to time deem necessary for those purposes, payable on such day or days as shall be fixed by the said directors, due notice of which shall be made to the proprietors, by advertisement in one or more of the newspapers published in Edinburgh, giving not less than fourteen days' notice, or by a letter put into the post-office, signed by the secretary or other officer or person or persons appointed by the directors; but that no call shall exceed the sum of £2 for every £20 on the sum or sums so subscribed, and so as no call to that amount be made but at an interval of three calendar months, at least, from the preceding call; which money so called for shall be paid to such bank or bankers, and in such manner as the said directors shall from time to time appoint or direct, for the purposes of this act; and the said calls shall bear interest from and after the periods of payment so fixed until payment, and in case such proprietor or proprietors shall neglect or refuse to pay his, her, or their rateable or proportionable part or share of the said money to be called for as aforesaid, and interest thereon, for the space of two calendar months after the time, or any of the respective times, fixed for payment thereof as aforesaid, then and in every such case, the same, with the interest due thereon, and costs of suit, may be either sued for and recovered by the said Company, in the manner after directed, in the Court of Session, or in any competent Court or Courts in Scotland, or in any of his Majesty's Courts of Record at Westminster, or in the Courts of King's Bench or Common Pleas at Dublin, as the case may be; or otherwise, in the option of the said directors, such proprietor or proprietors neglecting to pay the same shall forfeit all her or their respective share or shares of the said capital stock, or part or parts thereof previously paid, and interest in the said Company; all which forfeitures shall go to and be for the benefit of the said Company, and all such forfeited share or shares shall or may be sold, &c.: *Providing always*, that no advantage shall be taken of any forfeiture of any such share or shares until notice of such intended forfeiture, in writing, shall have been previously given by the secretary or other officer person or persons appointed by the directors, to the proprietor or proprietors of such share or shares, by a letter or notice put into the post-office, or left at his, her, or their usual or last-known place of abode, nor *unless the same shall be declared to be forfeited at some meeting of the said Company, general or special*, to be held within

deny or confess and avoid any matter alleged in the declaration. The 2nd plea says no notice was given, but that is a fact which the act requires the plaintiffs to prove, as part of their case, it being one of the conditions precedent required by the 49th section. The Court of Common Pleas refused to allow a similar plea to this in *The London and Brighton Railway Company* v. *Wilson*, (*a*) *Tindal*, C. J., there

six calendar months next after such forfeiture shall happen to be made; which declaration shall *ipso jure* be a forfeiture of the said share or shares, of all sums paid thereon, and all interest or benefit arising therefrom, and that without the necessity of any process of law to that effect; and in case of such forfeiture the same shall be an indemnification to and for every proprietor so forfeiting all his or her share or shares and interest as aforesaid, against all and every action or actions, suit or suits, to be commenced or prosecuted for any breach of contract or other agreement between such proprietor or proprietors so forfeiting and the other proprietors."

And by section 50 it is enacted, "That in any actions or suits brought by the said Company, in the manner hereinafter directed, against any proprietor or proprietors of any share or shares in the said Company to recover any sum or sums of money due and payable to the said Company for or by reason of any call or calls made by virtue of this act, it shall be sufficient for the said Company to declare and allege that the defender or defenders, defendant or defendants, being a proprietor or proprietors of such or so many share or shares in the said Company, is or are indebted to the said Company in such sum or sums of money as the call or calls in arrear shall amount to, for such or so many sum or sums of money upon such or so many share or shares belonging to the said defender or defenders, defendant or defendants, as the case may happen to be, whereby a right of action or suit hath accrued to the said Company by virtue of this act; without setting forth the special matter; and in such action or suit it shall only be necessary to prove that the defender or defenders, defendant or defendants, at the time of making such call or calls was or were a proprietor or proprietors of some share or shares in the said Company, and that such call or calls was or were in fact made, and that such notice thereof was given as is directed by this act, without proving the appointment of the directors who made such call or calls, or other matter whatsoever, and the said Company shall thereupon be entitled to recover the call or calls which shall appear to be due, and the legal interest that may be due thereon, and the expenses that may be incurred in prosecuting for and recovering the same."

(*a*) *Ante* Vol. 1, p. 530; *S. C.* 6 Bing. N. C. 135.

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says, "It is expressly thrown on the plaintiff that at the trial he shall give proof of these two facts, (notice, and appointment of time and place). It is only provided for in the negative it is true,—'it shall only be necessary;' but it is in effect directly ordered; and the plea here already pleaded, of never indebted, will clearly call upon the plaintiff, before this debt can be recovered, to perform those conditions which are imposed upon him." It is true the 50th section, giving a concise form of declaration, dispenses with the allegation of notice, though it is required to be proved; it is therefore a bad plea which traverses that or any other fact, which has not been alleged in the declaration, and which is mere matter of inducement. In an action for goods sold and delivered, you cannot plead that the goods were not sold or delivered, as that would amount to the general issue.

If the plea is meant to be in denial, it ought to have concluded to the country: if in confession and avoidance, it cannot be supported; for, instead of confessing, it in fact denies the right of action to have ever existed. [Lord *Abinger*, C. B.—The declaration to make it sufficient must be referred to the statute, which must therefore substantially be considered as part of it.] Then a plea denying any one of those implied averments, ought to conclude to the country. The third plea is bad if the second is so; and the 4th is bad, for it is intended to shew that the defendant was not a proprietor when the action was brought, and it contains no averment whether the option of the directors was exercised and declared at a general or special meeting of the Company, as required by section 49. The sufficiency of the 5th plea will be governed by that of the 4th.

Crompton contrà.—Since the new rules there is, in fact, no general issue in an action of debt in statute. By R. H. T. 4 W. 4, tit. "Covenant and Debt," 2, it is provided that

"The plea of *nil debet* shall not be allowed in any action." And 3, "In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that he never was indebted in manner and form as in the declaration alleged, and such plea shall have the same operation as the plea of *non assumpsit*," &c. 4, "*In other actions of debt*, in which the plea of *nil debet* has hitherto been allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically same particular matter of fact alleged in the declaration or plead specially in confession and avoidance." Here the matters of fact intended to be denied, do not appear in the declaration, that being made unnecessary by the 50th section of the act; and there being no general issue, it becomes necessary to allege them in the plea. In that case it is said the plea ought to conclude to the country. No doubt the general rule is so, when there is a direct affirmative and negative. Com. Dig. Pleader (E 32, 33), 2 Saund. 337 *n.* (1)(*a*). We have here given colour. The action is given in form with great advantages by the statute, it is not like an action of debt, but is a new action given by section 49; and under that section the 2nd and 3rd pleas here are good in substance; the act says time and place must be mentioned in the notice, the declaration says nothing about them, therefore we cannot traverse it *modo et formâ*, it is like pleading no *ca. sa.* issued in an action on a recognizance of bail; then the plaintiff may reply setting it out. [*Alderson*, B.—There is this difficulty, the declaration in a short form must be considered as impliedly containing those averments which the act says must be proved, one of those is notice.] The judgment in the case in the Common Pleas was upon the ground that such pleas could not be pleaded together, not

(*a*) See *Hayman* v. *Gerrard*, 1 Saund. 103 a, n. (3).

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that they were bad in themselves. [*Alderson*, B.—The act considers that the defendant makes the call himself, he is a part of the Company.] Then it gives what would not exist at common law. There are two modes of proceeding, by suing, *or otherwise* forfeiture in the option of the directors. It is averred here that they have made their option, and they could not sue afterwards. The clause was meant for the benefit of shareholders; the forfeiture is to be made by the directors, and the defendant has no means of knowing whether they have had a general or special meeting; he can only aver therefore as here, that they have exercised their option.

Cowling in reply.—The argument on the other side is founded on the doubt whether you can plead never indebted to an action of debt on statute; but that point has been settled in *Earl Spencer* v. *Swannell* (*a*), where it was held that *nil debet* is still a good plea to an action of debt for penalties on statute. [*Alderson*, B.—That was a plea of *nil debet* given by statute.] *Parke*, B., in his judgment there admits that it is still a good plea, besides to simple contract. But this plea is bad either as a traverse or in confession and avoidance; for if it is a traverse, it ought to conclude to the country. [*Alderson*, B.—The observations of the Court of Common Pleas must be considered applicable to the question whether they may plead both pleas.] Whenever the main averment is the averment of debt, it must be traversed. Then how is this a plea in confession and avoidance? he says, "True I was indebted; but I am not bound to pay, because I have had no notice;" by confessing that he was indebted, he admits that there was notice. The avoidance therefore is repugnant to the confession. He may plead never indebted, as in the case of goods sold and

(*a*) 3 M. & W. 154.

delivered; the act says these things need not be traversed.

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LORD ABINGER, C. B.—The Court was in favour of the defendant upon the question that the directors cannot both forfeit his shares, and proceed against him by action; but, on consideration, we think the plaintiffs are entitled to judgment. Looking at the proviso in the act which ties up their hands as to forfeiture, there is no doubt there cannot be an effective forfeiture by the defendant, unless it be declared at a general or special meeting, within six months of the directors making their option. Then, is that forfeiture sufficiently averred in the plea? I was anxious to say that it was; but it is so specially required by the act, that such an averment should be stated, that I do not think the 4th plea is a sufficient defence to the action. As to the second, we have been perplexed by a wish to do justice to the defendant, and reconcile the difficulties occasioned by the general rules of pleading and this act. By those rules you cannot set up any matter not alleged or necessarily implied in the declaration; nor can you deny any material matter without concluding to the country. Here the declaration does not allege notice of the calls, and it is contended that that is an answer to the objection that the plea does not; but as notice is necessary by the act, the plea is bad for not alleging it. There is a mode of reconciling these difficulties.—The 4th rule says, "In actions of debt in which the plea of *nil debet* has been hitherto allowed, the defendant shall deny specificially some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance." There is no matter of fact alleged here, taking the declaration by itself, except that the defendant was indebted for calls; that would be bad at common law, and is only made good by the express enactment of the statute; and when so supported must be

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taken to include all facts necessary to be done by the plaintiffs to give them a right to sue: then interpreting this declaration by the act to make it good, you must suppose it contains every thing required to be proved; one of these is notice of calls, which therefore must be considered as included in the declaration. The case then comes within the 4th Rule which requires the defendant in actions of debt other than simple contract, to deny some particular fact alleged in the declaration, and is not inconsistent with the 3rd Rule. The defendant therefore has a right to protect himself by pleading *nunquàm indebitatus* in effect, in fact he denies that the calls were made and that notice was given; and this being a denial of the facts in the declaration, the plea ought to have concluded to the country, and is therefore bad on that special ground. The same objection applies to the 3rd and 5th pleas, which are in substance the same as the 2nd and 4th.

ALDERSON, B.—I am of the same opinion. The first plea not having been demurred to, the only difficulty has arisen on the double pleas. Under the 4th Rule the proper mode is to traverse allegations of fact. All the act means is this, to make a valid call, certain circumstances shall take place; the calls must be made, the defendant must be a proprietor at the time, and have notice. Those three facts existing the defendant is liable, and has no defence except by something subsequent, or by denying those facts; he may show payment, release, or an option exercised; for the directors cannot both do that and sue. Then does the 4th plea contain a proper statement of that defence? I think not, as it is not stated that the forfeiture was confirmed at the public meeting. Forfeiture might not be an adequate consideration; the restriction of the general meeting is for the benefit of the Company, and until all the preliminaries are gone through the defendant has no defence. The plea is therefore bad as not answering the

averment. The 5th is to be treated as the 4th, and the 3rd as the 2nd, with this difference, that it avers a thing not necessary to be proved.

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GURNEY and ROLFE, Bs., concurred.

Judgment for the plaintiffs (*a*).

(*a*) See the two following cases.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1840.

THE SOUTH EASTERN RAILWAY COMPANY *v.* HEBBLEWHITE.

1840.
June 3rd.

In an action for calls under the South Eastern Railway Act, 6 Will. 4, c. lxxv. the Court refused to allow the defendant to plead—1. That there were not a competent number of directors present when the calls were made; 2. That no notice of the calls; 3. Or of the time, or place, or person, for payment thereof was given; 4. That the calls were not made for the expenses of the undertaking, and not necessary for the purposes of the act; 5. Not made upon all the subscribers and proprietors; 9. Nor by competent persons, and for the sole purpose of the undertaking:—but confined them to the pleas of—1. *Nunquàm indebitatus*; 2. Defendant not a proprietor; and 3. That the directors had exercised their option in declaring the shares to be forfeited, and had taken the steps thereon directed by the act.

DEBT for calls.—A Judge's order had been obtained to plead the following pleas:—1st. *Nunquàm indebitatus*. 2nd. Defendant not a proprietor. 3rd. That there were not four directors who had paid the calls on their own shares present at the meetings when the calls were made. 4th. That the interest claimed was in respect of calls of which no notice had been given. 5th. Nor any time,

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place, or person appointed for payment. 6th. Calls not made for the purpose of defraying the expenses of the undertaking, and not necessary for the purpose in the act specified. 7th. Interest claimed in respect of shares which the Company had declared to be forfeited, and had given notice thereof to the defendant, who had assented. 8th. That the calls were not made upon all the subscribers and proprietors. 9th. Not made by competent persons, and for the sole purpose of the undertaking.

A rule *nisi* having been obtained by Sir *W. Follett* in *Easter* Term to strike out some of these pleas—

Cowling and *Crompton* shewed cause (*a*).—The defendant has a right to plead any matter which would put the Company to prove strictly the regularity of their proceedings. Their power to make calls is limited by the act (*b*); and although they are empowered by section 117 to use a general form of declaration, and to give in evidence certain matters only, that is only in order to make out a *primâ facie* case which would enable them to recover where no good defence was offered, but would be liable to be rebutted by any substantial objection. The case of *The London and Brighton Railway Company* v. *Wilson* (*c*), which would seem to allow this to be more than a *primâ facie* case, has been questioned in the Court of Exchequer in *The Edinburgh, Leith, and Newhaven Railway Company* v. *Hebblewhite* (*d*). It is only by pleading several pleas, that the Company can be called upon to shew whether they have made out a good title to call for subscriptions; it could not be done by such a plea as payment, and many of the defences sought to be set up here could probably not be given in evidence under *nunquàm indebitatus*.

(*a*) Before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.

(*b*) 6 Will. 4, c. xxv. s. 115.

(*c*) *Ante*, Vol. 1, p. 530.

(*d*) *Ante*, p. 237.

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Sir *W. Follett* and *W. J. Alexander*, contrà.—The case in the Common Pleas did not go to the extent of saying that the proof allowed by the statute should be sufficient in all cases; it is only contended that it furnishes a sufficient *primâ facie* case. The question in the Court of Exchequer arose on demurrer, and was as to the goodness of the pleas, not whether they were pleadable, or not. The form of action in these cases is given by the statute, with the consent of all the shareholders, in order to give a speedy remedy for the recovery of calls; and the defences given by section 117 are, "unless it shall appear that any call exceeded £5 per share, or was made payable before the expiration of three calendar months from the day appointed for the payment of the last preceding call, or that notice was not given as hereinbefore required, or that more than twenty calls had been made in some one year." Those pleas only, therefore, ought to be allowed to remain which furnish a substantial defence to this action, and the others struck out, according to the decision of the Court of Common Pleas, especially as it is sworn, and not denied, that they are pleaded only for delay.

Lord DENMAN, C. J.—In this case it is not necessary for us to determine whether the defences sought to be pleaded could be given in evidence under the plea of *nunquàm indebitatus*, or not; it is sufficient to say, that we consider most of them to be quite contrary to the provisions of the act of Parliament under which the action is brought; and in the exercise of our discretion under the statute of Anne, we shall be governed by the same view which the Court of Common Pleas adopted in the two cases of *The London and Brighton Railway Company* v. *Wilson* (*a*), and *The Same* v. *Fairclough* (*b*). The only pleas which we think

(*a*) *Ante*, Vol. 1, p. 530. (*b*) Ibid.

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ought to be allowed among those sought to be pleaded are:—1st. *Nunquàm indebitatus*; 2nd, That the defendant was not a proprietor; and 3rd, That the directors have exercised their option in declaring the shares of the defendant to be forfeited, and have taken the steps thereon directed by the act. The rule must be made absolute to strike out the other pleas.

Rule absolute.

COURT OF QUEEN'S BENCH.

Sittings after Michaelmas Term, 1840.

THE EASTERN COUNTIES RAILWAY COMPANY *v.* COOKE.

Nov. 26th.

SAME *v.* FAIRCLOUGH.

The Court refused to rescind a Judge's order, which gave leave to the defendant to plead (*inter alia*), that, before the calls were made, the directors declared the shares forfeited; but did not go on to say that the declaration of forfeiture had been confirmed by the Company.

DEBT.—In actions for calls, the defendants had obtained an order from *Littledale*, J., to plead,—1st. *Nunquàm indebitatus*. 2nd. That defendants were not owners or proprietors of the shares. 3rd. That before the calls were made, the defendants sold their shares to R. 4th. That before the calls were made, the directors declared the shares forfeited (*a*). 5th. That the calls were

(*a*) The 6 & 7 Will. 4, c. cvi. s. 160, gives power to the directors of the Company, in case of default in payment of calls for two months, to recover the same, or to declare the shares to be forfeited and to be sold; provided that no advantage shall be taken of any forfeiture until notice thereof to the owner, nor until the declaration of forfeiture of the directors shall have been confirmed either at a general or special general meeting of the Company, held three calendar months, at least, from the day of giving such notice of forfeiture.

not necessary, and were not made for the purposes of the Company. 6th. That no notice of the calls was given as required by the statute. 7th. That no time, place, or manner was appointed for payment thereof, as required by the statute. 8th. That defendants bought of a holder who had not paid the calls.

In Fairclough's case, (instead of the 3rd plea),—That the defendant was not an original proprietor, but bought from persons having no title, because they had no transfer from original proprietors in the form required by the act.

Shee, Serjt., in *Hilary* Term, having obtained a rule *nisi* to rescind the order as to the 4th plea,

Cresswell and *Crompton* shewed cause (*a*).—Unless a plea is pleaded only for delay, and therefore frivolous, the Court will not rescind the order. This is said to be bad under section 160, because it is not said that a general meeting of proprietors has sanctioned the forfeiture; but that is not required by the section. The directors, having declared the shares forfeited, cannot still call on the defendants to pay them.

Sir *J. Campbell*, Attorney-General, and *Shee*, Serjt., contrà.—This plea does not amount even to the one held bad in the case of *The Edinburgh, Leith, and Newhaven Railway Company* v. *Hebblewhite*(*b*), it not alleging any acts done by the Company ratifying the declaration of the directors as to forfeiture; therefore, under the statute of Anne, the plea is bad, being only for delay. The Company sue, not the directors, and the declaration of forfeiture does not divest the shareholder's interest; he has still a right to benefit until that declaration is confirmed by

(*a*) Before Lord *Denman*, C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

(*b*) *Ante*, p. 237.

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the Company, so he ought to be subject to liability. [Lord *Denman*, C. J.—Suppose, after action brought, a general meeting of the Company should confirm the forfeiture declared by the directors, there would be a difficulty.] But not until such declaration of forfeiture is confirmed, till then the holder of shares is liable.

Lord DENMAN, C. J.—In the case of *The Edinburgh, Leith, and Newhaven Railway Company* v. *Hebblewhite*, the Court did not say such a plea as this is not pleadable, but that the one there was bad. There is too much doubt here for us to strike out the plea.

LITTLEDALE, J.—The objection may be taken by demurrer, and then, if necessary, a Court of error may settle it.

WILLIAMS and COLERIDGE, Js., concurred.

Rule discharged.

COURT OF EXCHEQUER.

In Trinity Term, 1840.

THE EARL OF HARBOROUGH *v.* SHARDLOW.

1840.
June 5th.

TROVER for trees, &c.—Pleas—1st. Not guilty. 2nd. That plaintiff was not possessed thereof as of his own property, &c. At the trial before Lord *Denman*, C. J., at the Rutland Spring Assizes, 1840, the following facts appeared:—The Earl of Harborough is owner of estates in Stapleford, Saxby, and Wymondham, in Leicestershire. The Oakham canal was made in 1794, under 33 Geo. 3, c. ciii., and runs through the lands of the Earl in Saxby and Wymondham. When this canal was first made, the towing-path was on the west side of it. About ten years ago, Lord Harborough prevailed upon the Company to allow him to change the towing-path from the west to the east side of the canal, to prevent boatmen, &c., trespassing on his park, the paling of which was made near to the edge

A canal act (33 Geo. 3, c. ciii. s. 31,) provided, that after land, &c., should be set out for making the intended canal, it should be lawful for all persons seised, or possessed of, or interested in any such land, &c., to contract for, sell, and convey the same to the Company; and that all such contracts should be *inrolled* with the clerk of the peace, &c., and copies thereof be evidence.

By sect. 34 commissioners are appointed, (for settling differences between the owners and Company), who, by sect. 41, *by writing* under their hands and seals, with consent of parties, are to determine and adjust the sum to be paid by the Company for the purchase of such lands, &c., or, in case of refusal or incapacity to treat, &c., to summon a jury to assess the sum to be paid, the verdict of which jury is to be binding and conclusive on all parties. Sect. 47 provides, that, upon payment of such sum or sums of money as shall be contracted or agreed for between the parties, or determined or adjusted by the commissioners, or assessed by such juries *in manner herein before respectively mentioned*, such lands shall be vested in the Company.

Held, that to vest lands in the Company otherwise than by actual conveyance, there must be payment for lands contracted for in writing, or the price of which was adjusted by the commissioners in writing, or the value found by the jury in writing.

And that proof of payment of purchase-money to the owner for lands, without proof of such contract in writing, is not sufficient evidence of title.

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of the west side of the canal. There is a narrow strip of land between this paling and the canal, on which several trees and shrubs have sprung up. The committee of the Company, in April, 1839, ordered these to be cut down, and the defendant, who is the overlooker of the workmen on the canal, came in August following with two of the Company's men, and cut down and carried away the trees.

When the land was originally taken for the purposes of the act, no conveyance passed; but the Company gave in evidence two receipts for the purchase-money of land belonging to the plaintiff's father, which, it was contended, did not prove it to be paid for the purchase of the particular piece of ground in question, nor was there any evidence of identity, but the fact of the Company having for some years used it for a towing-path. The receipts were signed by two persons, agents for the then Earl of Harborough for the receipt of rents, &c. It was contended by the defendant, that the fee in the land vested on payment of the purchase-money, under the 31st and 47th clauses of the act (*a*).

(*a*) By the 33 Geo. 3, c. ciii. s. 1, it is enacted, That it shall be lawful for the Company to make towing-paths, &c., making satisfaction in manner hereinafter mentioned to the owners and proprietors of lands taken for that purpose, for all damages by them sustained in the execution of the powers of the act.

Section 11 gives power to the Earl of Harborough twice to alter the towing-paths in Saxby and Wymondham.

Section 31 enacts, That after any land, ground, or other hereditament shall be set out and ascertained for making the said canal, it shall be lawful to and for every person and persons who shall be seised, possessed of, or interested in any lands, grounds, or other hereditaments which shall be so set out and ascertained as aforesaid, or any part thereof, *to contract for, sell, and convey* to the said Company of proprietors all or any part of such lands, grounds, or other hereditaments, which shall from time to time be so set out and ascertained as aforesaid; and all persons so selling, conveying, or exchanging as aforesaid, are hereby indemnified for what they shall respectively do by virtue and in pursuance of this act, and all such contracts, agreements, sales, exchanges, conveyances, and assurances so to be

His Lordship directed the jury, that, upon payment of money to the owners of the land, it vested in the Com-

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made as aforesaid, shall be made at the expense of the said Company of proprietors, and inrolled with the clerk of the peace for the county in which such lands, grounds, or hereditaments shall respectively lie, and copies thereof shall be evidence.

By section 34, commissioners are appointed for settling differences between the Company and the owners of, or persons interested in lands.

Section 41 authorizes and empowers the commissioners, or any five or more of them, by writing under their hands and seals, with the consent of the parties concerned, to determine and adjust what sum shall be paid by the Company for the absolute purchase of such land, and also to determine and adjust the recompense to be made for any damages which may be sustained by such owners, &c.; and in case such owner shall refuse to submit such matter to, or shall be dissatisfied with, the determination of the commissioners, or shall refuse to receive, on due tender thereof made, such purchase-money or recompense, or shall, upon twenty-one days' notice in writing being given, neglect or refuse to treat, or shall not agree with the said Company, or by reason of absence shall be prevented from treating, or through disability by non-age, coverture, or other impediment, cannot treat for themselves, or make such agreement as shall be convenient for promoting the said navigation, &c., then and in every such case the said commissioners, or any five or more of them, shall and they are hereby authorized to issue a warrant under their hands and seals to the sheriff &c. of the county, commanding him to summon a jury to assess the purchase-money, rents, and recompense, and the commissioners shall give judgment for the same; and that the said commissioners and juries respectively shall, in all determinations, judgments, and verdicts which they shall respectively make and give in execution of these powers, separate and distinguish the value set upon the lands, and the money assessed and adjusted for damages, from each other; all which said determinations, judgments, and verdicts shall be binding upon all parties, and final to all intents and purposes, and shall not be removed by *certiorari*, &c.

And by section 47 it is enacted, That upon payment of such sum or sums of money, or annual rent, as shall be contracted or agreed for between the parties, or determined and adjusted by the said commissioners, or any five or more of them, or assessed by such juries, *in manner hereinbefore respectively mentioned*, for the purchase of any such lands, grounds, tenements, or hereditaments as aforesaid, to the owner or owners thereof, or other person or persons entitled to receive such monies or rent respectively; or legal tender thereof, made to such owner or owners or other person or

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pany; that the change of the towing-path made no difference in this; and that if they thought the land taken for the purposes of the canal had been so purchased, they must find for the defendant. The jury found a verdict accordingly; and *M. D. Hill*, in the following Easter Term, having obtained a rule *nisi* for a new trial on the ground of misdirection,

Adams, Serjt., and *Humfrey* now shewed cause (*a*).—The question is, whether twenty years' possession is sufficient, without a contract. Here the Company have had unin-

persons, &c., at any time after the same shall have been so agreed for, determined, or assessed; or if he, she, or they cannot be found, or shall refuse to accept such money or rent, then and in every such case, upon payment thereof to such person or persons as the said commissioners, or any five or more of them, by writing under their hands, shall appoint, for the use of and to be paid upon demand, without fee or reward, to such owners or persons respectively as aforesaid, such lands, grounds, tenements, or hereditaments, and the fee-simple and inheritance thereof respectively, shall from thenceforth be vested in and become the sole property of the said Company of proprietors, their successors and assigns, to and for the use of the said navigation for ever; and immediately thereupon, but not before, it shall be lawful for them, their agents, workmen, and servants, to enter upon the same, and to dig, cut, trench, sough, and remove earth, stone, rubbish, trees, roots of trees, and all other obstructions for the making, using, maintaining, and repairing the said navigation and towing-paths on the sides thereof, in or upon such lands, grounds, or hereditaments for which such satisfaction shall be agreed for, determined, and assessed as aforesaid; and thereupon to make, erect, or do any works, matters, and things for the effecting and carrying on, supporting and maintaining the said navigation, as the said Company of proprietors shall think requisite; and to have, use, and enjoy the premises to and for their own use and benefit, for the purposes of the said navigation, discharged of all right and claim whatsoever thereon.

And by section 48 it is enacted, That the said determination of the commissioners, and the said verdicts and judgments, shall be kept by the clerks of the peace amongst the records of the quarter sessions of the county, and shall be deemed to be records of the said quarter sessions to all intents and purposes.

(*a*) Before *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

terrupted possession for forty years, whereas the bare possession would have been sufficient, as in *Doe* d. *Robins* v. *The Warwick Canal Company* (*a*), where there was no evidence of money having been paid. Here the payment of the purchase-money was proved, and there must be money paid or a written contract, by section 47. [*Parke*, B.—All that applies as much to an easement; the real question is, whether the payment constitutes a title.] Such clauses are frequently introduced to meet the case where there is no conveyance, as in the case of *The Bath River Navigation Company* v. *Willis and Others* (*b*).

M. D. Hill and *Mellor*, contrà.—In the case last cited the verdict was of necessity reduced to writing, and became a record, which is the highest of all evidence. The words in the 47th section, "in manner hereinbefore mentioned," refer to section 31, which says they may *contract for*, that is, make contracts according to law, in writing: a parol agreement or payment of money could not be inrolled, therefore there must be writing to satisfy the latter part of that section. [*Alderson*, B.—This is worthy of consideration: By section 31, there are three classes of conveyance—1st. By persons capable; 2nd. By persons not willing, though capable; 3rd. By persons not capable. Then comes section 47, which shews that in all cases you must couple the payment of money with a definite act, either a contract, assessment, or verdict.] In *Doe* d. *Robins* v. *The Warwick Canal Company* (*a*), *Tindal*, C. J., uses the very words of the Statute of Frauds, "a contract in writing," and the danger which has accrued in this case is an attempt to prove, by parol, parcels which have passed by deed, which is in express violation of that statute. It cannot be ascertained whether the interest of the Company is fee-simple, or an easement. The payment of the money

(*a*) 2 Bing. N. C. 483. (*b*) *Ante*, p. 7.

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is consistent with either, and the receipts do not shew that this particular part was included in the payments.

PARKE, B.—This rule must be absolute. The question is, whether the case presented by the Lord Chief Justice to the jury, as to whether the payments proved by the defendant were made for the land in question, if they were, that being conclusive evidence of its being land purchased of Lord Harborough under section 47, was correct. It was not left to the jury whether a possession for twenty or for forty years was sufficient: if so, and they had found it was so occupied, the verdict might have been supported. I think it was not enough for the purpose of proving the title of the Company to shew that they paid the purchase-money for the land in question; but that to convey a title under section 47, there must be a payment for land contracted for *in writing* between the parties, or of sums determined and adjusted by the commissioners, or assessed by a jury in the manner *thereinbefore respectively mentioned.* Then we must look to the former sections, to see what sort of contract is required. Section 31 says the contracts are to be inrolled, therefore that shews they must be in writing, so as to define the precise lands; which, coupled with a payment, would be sufficient to vest the lands in the Company. In the case of *Doe* d. *Robins* v. *The Warwick Canal Company* (*a*), there was a difficulty about a conveyance in writing being presumed, but Lord *Denman* has assumed that if payment has been made for this bank, under section 47, it is sufficient: I think not, unless there be a contract in writing, in order that the identity of the lands may appear from the writing, as it would also from the adjustment of the commissioners, or inquisition of the jury. It seems to me, therefore, the summing up was not right; in order to make a title otherwise than by conveyance, one of these things I have mentioned must take place, payment

(*a*) 2 Bing. N. C. 483.

for lands contracted for in writing, or of which the value has been determined by the commissioners in writing, or found by a jury in writing. I agree with the Court of Common Pleas in their decision in *Doe* d. *Robins* v. *The Warwick Canal Company* (*a*). There might be a question about such a conveyance in writing being presumed, if there be evidence from the acts of the parties to warrant it; but that question should be left to the jury.

ALDERSON, B.—The clause in the act referred to in *Doe* d. *Robins* v. *The Warwick Canal Company* is exactly the same as the one in this act, and there is no doubt a compliance with the 47th section will pass the property. Then what is a compliance with that section? There are three cases provided for:—1st. The case of amicable arrangements, where there must be payment under a contract in writing, which is to be inrolled. 2nd. If there be an indisposition to agree, the commissioners, with the consent of the parties, have power to determine and adjust; that must be by writing under their hands and seals. 3rd. Where the proprietors refuse, or are absent, or from certain disabilities are incapable of contracting, a jury is to be summoned to assess and give a verdict for the value of the lands, and therefore, to distinguish them. An actual *conveyance* is not necessary, but the land can only be vested by payment in one of these three ways.

GURNEY, B., concurred.

ROLFE, B.—The section for vesting the land in the Company was not complied with; the contracts "hereinbefore mentioned," in this case, are those to be inrolled. It was improperly left to the jury to say whether they were satisfied the money was paid "for lands contracted for"; it should have been "for lands contracted for in writing".

Rule absolute.

(*a*) 2 Bing. N. C. 483.

COURT OF QUEEN'S BENCH.

Sittings after Trinity Term, 1840.

THE QUEEN *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

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June 16*th*.

A *mandamus* was issued to a railway Company, (who had obtained an act for making a railway from London to Norwich and Yarmouth, but had only purchased lands and commenced works on a part of the line, viz. from London to Colchester, and it appeared doubtful whether they intended to proceed further), suggesting that the Company had been required to set out and define any proposed deviations from the original line, and to proceed to make and complete the railway from London to Norwich and Yarmouth, but that they had absolutely refused and neglected to purchase the lands necessary to the making between Colchester and Norwich, and Norwich and Yarmouth, or to set out and define the deviations, or to make and complete the railway. There was no averment that the Company had given up their design, or had wilfully exercised any injurious option in taking land, or were not proceeding with all convenient speed, or that a reasonable time had elapsed without due preparations being made, or that it would not be more advantageous to abide by the original line, than to set out and define a different one.

Held, that the *mandamus* was insufficient.

MANDAMUS(*a*) issued, tested 12th June, 2 Vict. (1839), suggesting as follows:—"Whereas by an act (7 W. 4, c. cvi.), intituled &c., it is (amongst other things) recited, that whereas the several persons thereinafter named are willing, at their own costs and charges, to carry the said undertaking into execution; and that certain persons therein named or described, and their several and respective successors, &c. shall be, and they are thereby united into a Company for making and maintaining the said railway and other works by the said act authorized, and for other the purposes therein declared, according to the pro-

(*a*) See the case, *Regina* v. *The Eastern Counties Railway Company*, *ante*, Vol. I., p. 509, where the sections of the statutes (6 & 7 Will. 4, c. cvi. and 1 & 2 Vict. c. lxxxi.), relied upon in the arguments, are set out.

visions and restrictions thereinafter mentioned, and for that purpose shall be one body corporate, by the name and style of 'The Eastern Counties Railway Company,' and by that name shall have perpetual succession and a common seal, and shall and may sue and be sued, and also shall have power and authority to purchase, hold, and sell lands for the use of the said undertaking, without incurring any penalties or forfeitures; and that it shall be lawful for the said Company, and they are thereby empowered to make and maintain the railway thereinafter mentioned, with all proper works and conveniences connected therewith in the line or course, and upon, across, or over the lands delineated upon the amended plan and described in the amended book of reference, to be deposited with the respective clerks of the peace, &c., (that is to say) a railway commencing at or near High Street, Shoreditch, in the parish of St. Leonard's, Shoreditch, in the county of Middlesex; and to terminate in, at, or near Norwich and Great Yarmouth, (that is to say) as regards Norwich, in, at, or near Carrow Abbey Field, in or near the city and county of Norwich, and as regards Great Yarmouth, at or near the new suspension bridge in Great Yarmouth aforesaid; and that for the purposes, and subject to the provisions and restrictions of the said act, it shall be lawful for the said Company, their agents and workmen, and all other persons by them authorized, and they are thereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of the said act such parts thereof as they are by the said act empowered to take or use; and that it shall be lawful for the said Company to treat and agree for the purchase of any lands authorized to be taken and used by them as aforesaid, and of any subsisting leases, terms, estates, and interests therein, and charges thereon, or such of them, or such part thereof, as the said Company

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shall think proper: as &c., reference &c. And whereas by another act (2 Vict. c. lxxxi.), intituled &c., it is (amongst other things) enacted, That after the expiration of one year from the passing of the said last-mentioned act, it shall not be lawful for the said Company to deviate the centre line of the said railway, as laid down on the plans thereof referred to in the said first-mentioned act, unless the said Company shall, at the expiration of the said period, have set out and defined their line deviating from the line laid down on the said plan as aforesaid, and in such case the line so laid down and defined shall be the line to be adopted by the said Company, without deviation therefrom: as &c., reference &c.; and suggesting that the said persons so named or described in the said first-mentioned act, and so incorporated by the name and style of 'The Eastern Counties Railway Company,' did take upon themselves the execution of the said two several acts of Parliament, and of the several powers and provisions therein respectively contained; and that in pursuance thereof they have purchased lands for the use of the said undertaking, and have begun to make, and in part have completed the said railway between London and Colchester, in the county of Essex, and that they have not made any sufficient provision for setting out, executing, or working the line of the said railway beyond Colchester, or in the counties of Norfolk and Suffolk; and that one Charles Symonds, of the town of Great Yarmouth, in the county of Norfolk, Esquire, is the owner of a certain farm, cottage, yard, barn, orchards, and garden, situate in the parish of Wetheringsett, in the said county, which are described in the schedule to the first-mentioned act of Parliament, and through which said farm and lands the centre line of the said railway, as laid down in the plans thereof referred to in the said first-mentioned act, runs; and that he the said Charles Symonds has required you, the Eastern Counties Railway Company, to set out and define the line

of the said railway deviating from the line laid down on the plans, in the said last-mentioned act in that behalf referred to, and to proceed to make and complete the said railway from London to Norwich and Yarmouth. Yet that you the said Company well knowing the premises, but not regarding your duty in this behalf, have absolutely refused and neglected, and still do refuse and neglect, to purchase the lands necessary to the making and completing the said railway, and lying between Colchester and Norwich and Norwich and Yarmouth aforesaid, or to set out and define the line of the said railway deviating as aforesaid, or to make and complete the said railway, according to the provisions of the said acts of Parliament; in contempt of us, and to the great damage of the said Charles Symonds, and to the manifest injury of his estate," &c.

The mandatory part of the writ was as follows:—"We," &c., "do command you the said Eastern Counties Railway Company, that, immediately after the receipt of this writ, you do proceed to make and complete a railway from London to Norwich and Yarmouth, passing by Romford, Chelmsford, Colchester, and Ipswich, according to the provisions of the said act (7 Will. 4, c. cvi.), intituled &c., and of the said other act (2 Vict. c. lxxxi.), intituled &c., and especially that you set out and define the line of the said railway (particularly that part thereof lying between Colchester and Norwich, and Norwich and Yarmouth) deviating from the line laid down on the plans in the said last-mentioned act in that behalf referred to, and that you proceed to purchase the lands necessary to the making and completing the said railway, and lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, pursuant to the provisions of the said several acts of Parliament in that behalf contained, or that you shew us cause," &c.

Return, filed 2nd November, 1839, by the Eastern Counties Railway Company. That the said Charles Symonds

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has not required us to set out and define the line of the said railway deviating from the line laid down in the plans, in the said act of Parliament in the said writ first-mentioned, and in that behalf referred to, *and* to proceed to make and complete the said railway from London to Norwich and Yarmouth, in manner and form as in the said writ is alleged.

That we have set out and defined the line of the said railway, particularly that part thereof lying between Colchester and Norwich and Norwich and Yarmouth, deviating from the line laid down on the plans in the said act of Parliament in the said writ first-mentioned, and in that behalf referred to, pursuant to the provisions of the said several acts of Parliament in that behalf. That we, the said Eastern Counties Railway Company, have, from the time of passing the said act of Parliament in the said writ first-mentioned hitherto, exercised a reasonable discretion, option, and judgment in making and completing the said railway, and in compulsorily requiring, taking, using, agreeing for, or causing to be valued and paid for, all and every of such lands, as we are by the said act of Parliament in the said writ first-mentioned empowered to take or use as aforesaid; and that we have, in exercise of such reasonable discretion, option, and judgment as aforesaid, proceeded to make and complete, and have made and completed, certain large portions of the said railway, and have purchased, as well all and every of such lands as are necessary for the making and completing the said railway and other works by the said last-mentioned act of Parliament authorized, between London and Colchester, in the county of Essex, as also a certain large portion of the lands which are necessary to the making and completing the said railway, and lying between Colchester and Norwich and Norwich and Yarmouth, which said last-mentioned lands are all of the lands so lying between Colchester and Norwich, and Norwich and Yarmouth, which we, the said Eastern Counties Railway Company, in the

exercise of such reasonable discretion, option, and judgment as aforesaid, and in execution of the powers of the said several acts of Parliament respectively in the said writ mentioned, and for the purposes thereof, have deemed expedient and proper to purchase, before and at the time of the issuing of the said writ of *mandamus*, or at any time since, for the purposes of making the said railway and other works by the said acts of Parliament authorized.

And that in execution and in pursuance and by virtue of the powers and provisions of the said act of Parliament in the said writ first-mentioned, and for the purposes of making and maintaining the said railway and other works by the said last-mentioned act authorized, and before and at the time of the issuing of the said writ of *mandamus*, divers subscriptions, calls, and sums of money had been subscribed and paid up to us, by the several persons who have at any time subscribed, or agreed to advance or pay any monies, for or towards the making and maintaining the said railway and other works by the said last-mentioned act authorized; and that we had also for the purposes last aforesaid, before and at the time of the issuing of the said writ of *mandamus*, borrowed and taken up at interest, on the credit of our said undertaking, a certain other sum of money, and that we had also in divers ways and on divers times, before and at the time of the issuing of the said writ of *mandamus*, received to and for the use and benefit of our said Company, divers other sums of money, which said several sums of money so raised, borrowed, taken up, and received respectively as aforesaid, amount together to a large sum of money, to wit, the sum of £953,045.

And that we, the said Eastern Counties Railway Company, have partly laid out and expended and applied the said sum of money last-mentioned, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing the said last-mentioned act, and all

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other expenses preparatory or relating thereto, and partly in, for, and towards purchasing a certain large portion of the lands which we are by the said last-mentioned act of Parliament empowered to take or use, and partly in making and maintaining the said railway and other works, and otherwise in carrying the said act into execution; and that the residue of the said sum so raised, borrowed, taken up, and received respectively as aforesaid, amounting to a certain small sum of money, to wit, the sum of £9,892, now remains in our hands undisposed of, unused, unappropriated, unapplied, and ready to be laid out and expended and applied in making and maintaining the said railway by the said act authorized, and in otherwise carrying the said act into execution; which said last-mentioned remaining sum, together with the residue of the monies which we are by the said acts of Parliament empowered and authorized to raise, borrow, and take up, demand, or receive, for the purpose of making and completing the said railway, is wholly inadequate and insufficient for the purchase of the lands necessary to the making and completing the said railway lying between Colchester and Norwich, and Norwich and Yarmouth aforesaid, and for the making and completing the said railway in the said writ mentioned, and for these reasons and causes, we, the said Eastern Counties Railway Company, have *not* proceeded to make and complete a railway from London to Norwich, &c., according to the provisions of the said statutes in the said writ mentioned, in manner and form as by the said writ we are commanded. Given and humbly certified and returned by us under our common seal.

A *concilium* having been obtained, and the case inserted in the crown paper—

Sir *J. Campbell*, Attorney-General, moved to quash the return, and for a peremptory *mandamus* (*a*).—This case re-

(*a*) June 10th, 1840. Before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js.

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solves itself into two questions: 1st, Is there a liability to this proceeding by *mandamus?* 2nd, Have the Company given a sufficient answer? This is an act for making a railway from London to Yarmouth, not Colchester. By sections 3 and 5 they are empowered to raise money, and by section 9 to take lands. By the 174th the public are entitled to the use of the railroad, and by the 122nd the compulsory powers are to cease. By a subsequent act, (1 & 2 Vict. c. lxxxi.), the time is extended for two years.

This *mandamus* had three objects: 1, the setting out of deviations; 2, the purchase of lands; 3, the completion of the line. If the act requires these things to be done, there is no other mode than this of compelling them: there is a legal right without a legal remedy. The case of *Blakemore* v. *The Glamorganshire Canal Company* (*a*) is distinctly applicable to these cases of contract and nonfeazance, that if there is a neglect to do what ought to be done, the remedy is by *mandamus;* but whether by that or indictment, the Company must be made to do their duty, because they have both received subscriptions, and purchased lands. The legislature and the public are interested in the completion: the former, who would not have granted the powers but for the sake of the unity of the undertaking; and the latter, who, by section 6, have a right to go to Yarmouth. In *Rex* v. *The Inhabitants of Cumberworth* (*b*), the Court held it to be one contract to make the whole of a road, and that they could not ingraft into it a new plan. Lord *Tenterden*, C. J., there says, "It seems to me to be a wholesome doctrine, that trustees who are empowered to make a road from one place to another, should be bound to make the whole of that road, before they throw on the public the burden of repairing any part of it." And in a subsequent decision of the same case (*c*), *Patteson*, J., says, "Acts of this kind certainly constitute a species of bar-

(*a*) 1 Myl. & K. 162. (*b*) 3 B. & Ad. 108.
(*c*) 1 N. & P. 205.

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gain, by which lands are allowed to be taken by the trustees, upon certain conditions, for the purpose of making roads, and unless the trustees do all they have engaged to do, they do not complete the bargain they have made." Assuming, then, that there is such an obligation, and that the writ is good on the face of it, what excuse is made to the three demands? To the first they traverse an immaterial allegation, namely, the request of Charles Symonds; not that he is the owner of land through which the railway is to run, and that the land is required, nor that they have not completed, and that it is to his damage, and that he has besought a remedy. It is shewn that he is aggrieved and comes to this Court for relief, and they negative nothing but a prior request by him; then to the second demand as to purchasing the lands, they say they have an option and do not choose to do so. But this is not an act giving them such option or discretion; if they are *bonâ fide* executing the whole work they may have a discretion, but not to do part with the intention of abandoning the remainder. They then give a financial detail of the circumstances of the Company, by which it appears they have not raised one half of the sum the act enables them to raise, and they say that it is their opinion the residue is inadequate. If they had returned "*nulla bona*" it would have been bad, and they must at their peril have found funds. *Rex* v. *The Commissioners for improving Market Street, Manchester* (*a*), shews, that the want of funds is no excuse, and in that case there was a positive return, not a speculative opinion as here; but even that was held no apology. In *Rex* v. *Mayor of Wells* (*b*), *Patteson*, J., says, "The power to hold this Court being granted by the charter, I do not think the corporation can lay it aside merely on the ground of want of funds." So, in *Rex* v. *The Commissioners of the South Level Drainage* (*c*) and *Rex* v.

(*a*) 4 B. & Ad. 335.
(*b*) 4 Dowl. P. C. 562.
(*c*) Q. B., Easter Term, 1838, not reported.

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The Ouze Bank Commissioners (*a*), where there was a discretion; *Patteson*, J., there says, "Possibly it might have been enough, if the commissioners had returned that they had from time to time done all things necessary for putting the banks in a permanent state of repair; but I for one should have thought that not sufficient. The commissioners are entrusted with money for a particular purpose, and I think they should shew that they have expended a part of the money in the works, and are proceeding with them. The Court does not by the word "forthwith" mean to command them to do every thing instantly, but to set about the works directly, and do what they can. If they had done all they could they should have said so; but this they do not say." The return was therefore held bad, and a peremptory *mandamus* issued. In *Rex* v. *Round* (*b*), the obligation was cast on the defendant merely because he had some books in his possession, and the return was held good, because it shewed that the facts suggested in the writ did not exist at the time it was issued. Here the return is clearly insufficient; and a peremptory *mandamus* ought to be awarded.

Sir *W. Follett*, *contrà*.—It is doubtful whether a *mandamus* can be issued in such a case as this. There must be an imperative duty imposed by Parliament, and a possibility of doing it. This act is not imperative, and was not intended to be so: and if it were, there was a better mode of trying the question by traversing the return, in which case the Company might have had the advantage of a writ of error. They have no other appeal. [*Patteson*, J.—It has been determined expressly in this Court that they are not bound to traverse. *Rex* v. *The Lords of the Manor of Oundle* (*c*).] That was, that after the award of a peremptory

(*a*) 3 A. & E. 544. (*b*) 4 A. & E. 139; 5 N. & M. 427.
(*c*) 1 A. & E. 297.

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mandamus, the Court would not compel the prosecutor to demur to the return: at all events the judgment of this Court is final. *Rex* v. *The Mayor and Aldermen of London* (*a*). Then they should have proceeded by indictment for disobedience to the statute; a *mandamus* is to do a specific act. [*Littledale*, J.—That would be to punish them, not to give the public their rights.] All that can be done in case of contempt to a *mandamus* is to proceed by attachment. *Rex* v. *The Severn and Wye Railway Company* (*b*) has been doubted; and there the writ was granted because they were a corporation, not private individuals. The only case of an attempt of this kind was in *Rex* v. *The Proprietors of the Birmingham Canal Navigation* (*c*), and there the judgment of Lord *Mansfield*, C. J., is directly in point that acts of this description imply an authority, not a command; and that case having been decided so long ago, and no other instance having occurred since, shews at least that in the opinion of professional men this Court has no such power. The legislature seems to have contemplated the possible abandonment of the work; for if the money be not subscribed, even after the passing of the act, by section 220 they lose the compulsory powers; and whereas this is an application to compel them to complete the work, the act says, (section 223), after seven years they shall not do so. Sections 222, 223, and 254, also clearly shew that it is not imperative.

But the *mandamus* is defective as shewing no ground for this application. It recites the provisions of the act, and that the Company in the execution of their powers have done such and such things. It does not say the whole money has been raised, or that the Company have the power to take the lands, but proceeds on the ground that the moment the act passed they were liable to such proceedings. There is no allegation of unreasonable delay,

(*a*) 3 B. & Ad. 255. (*b*) 2 B. & Ald. 646.
(*c*) 2 W. Bl. 708.

but merely a neglect and refusal to purchase, as to which at least they must have a discretion. The *mandamus*, therefore, ought to be quashed for insufficiency, there being nothing to make this a particular case, or that could not apply to any such Company at any time and under any circumstances. No specific fact or reason is alleged to give an opportunity of denial, and the Court ought to be very reluctant to lay down such a precedent.

As to the cases cited on the other side, *Rex* v. *Cumberworth* (*a*) has no bearing on this: that was a decision that the parish is not to be burthened till a road is completed; before that, it is not a public highway; nor is there any statement there that the Court would grant a *mandamus*. In *Rex* v. *The Commissioners for improving Market Street, Manchester* (*b*), there was a right to give notice and take houses; they did give notice, and afterwards thought fit not to take the property. The question there turned upon the Company's being bound to do so, they having no right to give such notice, and put parties to inconvenience without completing. [*Patteson*, J.—There was a case of *Rex* v. *The St. Katherine Dock Company* (*c*), where a *mandamus* was issued.] So there was in *Rex* v. *The Hungerford Market Company* (*d*); but to make these cases applicable it must be shewn that a want of funds has been held no answer. *Rex* v. *Mayor of Wells* (*e*) only shews, that if they take their charter, and have the benefit of it, they must hold their court. As to the case of *The South Level Drainage* (*g*), that is a mere manuscript report, and there was there a power to take. *Rex* v. *The Ouze Bank Commissioners* (*h*) turned upon the form, which was nonsense; and *Rex* v. *Round* (*i*) proceeded on the doctrine, that if the par-

(*a*) 3 B. & Ad. 108; 4 Ad. & E. 831.
(*b*) 4 B. & Ad. 333, n. (*a*).
(*c*) 1 N. & M. 121; 4 B. & Ad. 360.
(*d*) 4 A. & E. 327.
(*e*) 4 D. P. C. 562.
(*g*) *Ante*, p. 268.
(*h*) 3 A. & E. 544.
(*i*) 4 A. & E. 139.

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ties *could* not obey the *mandamus*, that was a sufficient return. The clear law is that the parties have a discretion, and a right to exercise their judgment unfettered by this Court; but if it further appears that by no possibility they can do it, independently of the general question of law, there can be no power by *mandamus* to compel them. It is not necessary for the Company to rely on the insufficiency of the writ; if they are liable, it is useless to get rid of their liability on such a point. But they return that they have exercised a reasonable discretion, opinion, and judgment; that is, in substance, they have done the works they think necessary, and purchased the lands required fairly and honestly up to the present time; and such a return must be held good, independently of any other answer, unless there is a controlling power in this Court over the discretion of Companies.

There is, however, a point that puts the question beyond doubt, namely, that the funds are inadequate. The effect of the return is, that they have raised a certain sum, and expended all but a small balance; that balance, with every shilling they can raise in addition, is insufficient: there is no power of compelling the undertakers to advance their own private funds, for the legislature has in distinct terms limited their liability. The power of raising the additional money does not affect the question, that would only enable the Company to do part; whereas this *mandamus* requires them in positive terms to do all. It must stand or fall by its own terms, and in their fullest extent. *Rex* v. *The Church Trustees of St. Pancras* (*a*). The Court of Chancery proceeds upon a different principle in such cases. If the Lord Chancellor be satisfied that the funds are not sufficient, an injunction will be granted to restrain the proceedings. In *The Mayor, &c. of King's Lynn* v. *Pemberton* (*b*), an application was made to restrain com-

(*a*) 3 A. & E. 535. (*b*) 1 Swanst. 244.

missioners from cutting through *their own* lands, their funds being insufficient, and an application having been made to Parliament for further powers; there Lord *Eldon* says—"The circumstance of their not cutting through your lands distinguishes this case most materially from every other of the kind. In the case of *Agar* v. *The Regent's Canal Company* I acted on the principle, that where persons assume to satisfy the legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is, that the sum is not nearly sufficient; if the owner of an estate, through which the legislature has given to the speculators a right to carry the canal, can shew that the persons so authorized are unable to complete their work, and is prompt in his application for relief grounded on that fact, this Court will not permit the further prosecution of the undertaking." That decision shews that there is no such compulsory power in this Court, for if a *mandamus* could have been issued in that case, there would have been no relief in equity. It has been held, too, in the Court of Exchequer, in *Thicknesse* v. *The Lancaster Canal Company* (*a*), that the Company had a discretion as to resuming their works at any period; whereas, if there had been an application for a *mandamus*, it must have been made upon an intendment that they were compellable to complete them in a reasonable time. The same principle is apparent in *Blakemore* v. *The Glamorganshire Canal Navigation* (*b*). This writ, therefore, ought to be quashed, and no peremptory *mandamus* issued, which would have the effect of putting this Court and the Court of Chancery upon a different footing.

Creswell (in the absence of the Attorney-General) in reply.—The broad question is, is this act permissive or im-

(*a*) 4 M. & W. 472. (*b*) 1 Myl. & K. 154.

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perative; and if permissive, is it so as to making one part and abandoning the residue? The Company have no authority to make any other railway than from London to Norwich and Yarmouth, and it was upon the faith of their being willing at their own cost and risk to do it that they were enabled. In *The Mayor, &c. of King's Lynn* v. *Pemberton* (*a*), fraud was imputed both on the legislature and on the parties. In *Thicknesse* v. *The Lancaster Canal Company* (*b*), they were going on from time to time as they had funds, and there was nothing to indicate any limit of time. So, in *Lee* v. *Milner* (*c*), there was no intention of abandonment. As to *Rex* v. *The Proprietors of the Birmingham Canal Navigation* (*d*), perhaps there Lord *Mansfield* might be justified in saying the act imported only an authority, not a command; but that was not to a Company, but commissioners (as in *Harris* v. *Baker* (*e*), where an action was held not to be maintainable against trustees, under an act which gave them power to put lamps where they thought necessary, supposing they did not think it necessary to provide any); but *Willes* and *Blackstone*, Js., thought that, if there were *mala fides*, a *mandamus* would go even in a case of discretion. *Rex* v. *The Inhabitants of Cumberworth* (*g*) only shews the trustees had no power to limit the powers of a statute; and the case of *Rex* v. *The Hungerford Market Company* (*h*) is unanswerable; and, as in the case of *Rex* v. *Mayor of Wells* (*i*), they had accepted a charter, so they have here accepted the act, and are as much bound by it. The form of the *mandamus* is sufficient; all that is required is a *primâ facie* case that something cannot be done without the summary interference of the Court. There is a distinct allegation here that the Company have refused to do what

(*a*) 1 Swanst. 244.
(*b*) 4 M. & W. 472.
(*c*) 2 M. & W. 824.
(*d*) 2 W. Bl. 708.
(*e*) 4 M. & S. 27.
(*g*) 3 B. & Ad. 108; 4 A. & E. 731.
(*h*) 4 A. & E. 327.
(*i*) 4 D. P. C. 562.

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the act directs, namely, that they shall complete the line, and that makes out a case for such interference.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—In this case the Court granted a *mandamus* to complete the works which the Company had undertaken to execute by virtue of the powers entrusted to them by an act of Parliament. A return was made, the sufficiency of which being questioned, it was set down for argument, and has been very fully discussed before us. The defendants, however, denied that the writ of *mandamus* itself was legal, and on that preliminary point it is therefore needful that we should first form our opinion. We were told that our power to issue a writ of *mandamus* in any such case is at least doubtful, and were properly reminded that that form and method of proceeding may prevent our judgment from being revised by any court of error—a consideration which certainly ought to induce great caution in assuming jurisdiction, but cannot justify us in declining it where the law has lodged it with the Court. We have no more right to refuse to any of the Queen's subjects the redress which we are empowered to administer, than to enforce against them such powers as the constitution has not confided to us.

It was urged that our *mandamus* to compel obedience to an act of Parliament implying a disobedience at present, the prosecutor may indict, and, having that remedy, does not require the extraordinaay process of *mandamus*. This argument appears to prove too much, as it would prevent the Court from acting in all cases where an act of Parliament is contravened; besides, the indictment does not compel the performance, but only punishes the neglect of duty; although it was thought proper to remind us that a *mandamus* might do no more, for that disobedience could only bring the parties into contempt, and expose them to

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attachment, which would but end in individual suffering, and leave the required act still undone. We are not in the habit of supposing that persons required to obey the Queen's writs issuing from this Court will incur the penalty of contempt, or be advised contumaciously to evade the known and ancient process of the law.

Objection was also raised to a *mandamus* for insuring the execution of the works. Under this head it was, in effect, insinuated that similar acts of Parliament entail no duties whatever on those who may procure them; that they do but offer a boon which the projected Company may accept or reject, or partially accept and partially reject, at their sole will and pleasure. The assertion, appearing in them all, that they have provided the means of executing the intended works, was treated as no proof, even *primâ facie*, that they have sufficient funds for that purpose. The provision disabling the Company from taking land after the lapse of a certain term was put forth as a proof that they had full power to proceed with their works, or abandon them, without any regard to the interest of others. Some decisions of the Court of Chancery, which have enjoined Companies not to take possession of certain lands peculiarly circumstanced, were called inconsistent with any power in this Court to require that possession should be taken of lands under circumstances entirely different.

We think it right so far to advert to these remarks, that we may wholly disavow them as having at all conduced to the judgment which we are about to pronounce. When we made the rule absolute, we expressed our conviction that the case was in some respects new, and that its circumstances admitted of some doubt whether our power ought to be applied to them. We shall keep our minds open for the discussion of all such doubts on every proper occasion; but we do not yield to them, nor is it necessary to advert to them in coming to our present de-

cision. We neither hold the Court incompetent to enforce the execution of an act under the circumstances disclosed to us in the affidavits, nor think any of the reasons which we have enumerated are conclusive against making our *mandamus* peremptory.

These points will be as much open to argument hereafter as they were when the rule was obtained; but it will be perceived, on adverting to what was said on the former occasion, that we considered the facts then stated to afford strong evidence, that the Company, having obtained an act for a particular purpose, had stopped short, and had satisfied themselves with doing less than one-half of what they had undertaken to do, and represented themselves to be capable of doing. It was by that undertaking and representation that they obtained the act, and the great powers of occupying land and raising money, which it bestowed, We could not recognise their right to say to those who had contracted with them, and to the public, "Our undertaking does not bind us, because our statement was untrue; we have nothing to consider but the pecuniary interests of the Company, and claim to exercise unlimited option over these works and every part of them." The rule was made absolute, and the writ was directed to go, on the supposition that they had no intention to proceed *bonâ fide* with their works, but had, on the contrary, abandoned all intention to complete them.

But the prosecutors of the writ have stated no such facts. What they state may raise a suspicion on the subject, but falls far short of proof. The acts are recited in the inducement to the writ, especially the power to vary their line within a given time, or that otherwise they must abide by the line laid down in the plans. The writ proceeds to allege that Charles Symonds is the owner of lands near Yarmouth, enumerated in the schedule, and has required the Company to set out and define the line of railway deviating from that

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in the plans, and to proceed to make and complete the railway to Norwich and Yarmouth, and then it goes on to say, "Yet you, well knowing the premises, but not regarding your duty in that behalf, have absolutely refused and neglected, and still do refuse and neglect, to purchase the lands necessary for making and completing the said railway, &c., lying between Colchester and Norwich and Norwich and Yarmouth, or to set out and define the line of the said railway deviating as aforesaid, or to make and complete the said railway according to the provisions of the said act of Parliament;" and afterwards it commands the Company to complete the whole road—to set out the deviated line especially—and to purchase the lands necessary for that purpose.

Here is no averment that the Company have given up their design, or have wilfully exercised any injurious option, or that they are not effecting it with all convenient speed, or that even a reasonable time has elapsed, in the opinion of the prosecutors, without due preparation being made, or that it would not be more advantageous to all concerned to abide by the original line, than set out and define a different one.

The *gravamen* rests in the simple form of a complaint, that the Company have hitherto refused to purchase land at the time when Mr. Symonds required them to do so. There is no inconsistency between this and the possible fact of their having done all that prudence authorized to obtain such lands at equitable prices, and refused to purchase because fair bargains could not be obtained. We can infer no fault—it must be distinctly charged; and the charge as it stands is quite insufficient, and falls decidedly below the case which we thought was made reasonably probable by the affidavits on both sides. We therefore think that judgment must be given for the defendants.

Judgment for the defendants.

COURT OF EXCHEQUER.

In Trinity Term, 1840.

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June 16th.

Bell v. The Hull and Selby Railway Company.

CASE.—Action brought under an order of the Vice-Chancellor (*a*). The declaration stated that the plaintiff, before and at the time of the passing of an act of Parliament (6 Will. 4, c. lxxx) intituled &c., had been, and still was, lawfully possessed of and entitled to a certain wharf situate upon the river Humber; and that the defendants, in the exercise of the powers by the said act granted, so much injured the said wharf, as to render and cause the same to be inconvenient, and wholly unfit and useless for the transporting, conveying, landing, shipping, and depositing of goods and merchandize from, to, and at the said

The Hull and Selby Railway Act (6 Will. 4, c. lxxx. s. 69) provides, that "in all cases in which, in the exercise of any of the powers thereby granted, any part of any carriage, horse, or foot road, railway, or tram-road, quay, *wharf*, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company shall, at their own expense, before any such road, quay, wharf, or other communication, shall be cut through, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, or other communication, to be set out and made instead thereof, as convenient for passengers, &c., and for the transporting, conveying, landing, shipping, or depositing of goods or merchandize, as the road, quay, wharf, or other communication so to be cut through, taken, or injured as aforesaid, or as near thereto as may be." (Section 26 prescribes the process for ascertainment by jury of the value of, and past, future, temporary, perpetual, or recurring damages to, land to be taken, used, damaged, or injuriously affected by the execution of any of the powers of the act.)

The railway was made to pass in front of a wharf belonging to the plaintiff, between it and low-water mark, separating the frontage from the water, thereby causing inconvenience and risk to the plaintiff in loading and unloading vessels:—*Held*, that, under section 69, the injury is not confined to a *bodily* injury only; but that the plaintiff's wharf was *injured* within the meaning of that section, and that he was entitled to have a new wharf erected for him by the Company, and was not bound to apply for compensation under section 26.

Quære, under what circumstances proprietors, who have parted with their shares for the purpose of giving evidence for the Company, can become competent witnesses.

(*a*) *Bell* v. *The Hull and Selby Railway Company*, *ante*, Vol. I, p. 616.

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wharf; yet the defendants did not, nor would, at their own expense, cause another good and sufficient wharf to be set out and made instead thereof, as convenient for the transporting, conveying, landing, shipping, and depositing of goods and merchandize, as the said wharf so injured as aforesaid, or as near thereto as might be.

Pleas.—First, not guilty (by statute); Secondly, that the plaintiff was not lawfully possessed of the said wharf in the declaration mentioned: on which issue was joined.

At the trial before *Coleridge*, J., at the York Spring Assizes, 1840, it appeared that the plaintiff was the owner of a wharf at Hull, upon the Humber. The defendants, under their act, constructed a railway on the foreshore of the Humber, between the wharf and low-water mark, by which vessels were prevented from lying along side the wharf, for the purpose of loading and unloading their cargoes, as they had before done. The plaintiff had received compensation (under the verdict of a jury empannelled according to the 26th section), for the value of the land, the increased expense incurred for loading, and the additional risk to the goods; but he contended that the Company were bound to make him a new wharf under the 69th section. No part of his land was cut through, unless it should be considered that he had a right to the foreshore of the river.

The defendants called as a witness a Mr. Walker, one of the proprietors incorporated by name in the act. He stated on the *voir dire* that he had been the owner of 230 shares in the railway, which he had transferred to a Mr. Parker, in order to be qualified as a witness; that he believed there was an understanding that they should be returned, though nothing had been said about it; that he considered the return to depend on Parker's honour, but that he should take proceedings to compel him to re-transfer them to him. There were four other witnesses who

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appeared to be in nearly similar circumstances. The learned Judge rejected these witnesses as still interested, the transfer being merely colourable. The jury found, 1st, That the defendants had not given the plaintiff as good a communication as he had before; 2ndly, That he had not received compensation for this claim; and, 3rdly, That he was entitled to the foreshore of the river in front of his wharf: and a verdict was entered for the plaintiff with nominal damages (*a*).

It was objected for the defendants—1st, That the 69th section of the railway act imposed upon the defendants the obligation of making a communication only, and not a new wharf, as alleged in the declaration; and, therefore, that a nonsuit ought to be entered. 2ndly, That Mr. Walker was improperly rejected at the trial as a witness for the defend-

(*a*) By section 26, the Company are empowered to summon and empannel a jury, to assess damages in respect of the value of land taken, and also the sum of money to be paid by way of satisfaction, either for the damages which shall before that time have been done or sustained as aforesaid, or for the temporary or perpetual, or for any recurring damages which may be so done or sustained as aforesaid, and the cause and occasion of which shall have been in part only obviated, removed, or repaired by the said Company; which satisfaction or compensation for such damage or loss, shall be inquired into and assessed, separately and distinctly from the value of the lands so to be taken or used as aforesaid.

By section 69, it is enacted, "That in all cases in which, in the exercise of any of the powers hereby granted, any part of any carriage, horse, or foot-road, railway or tram-road, quay, *wharf*, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the said Company shall, at their own expense, before any such road, &c. shall be so cut through, &c. as aforesaid, cause another good and sufficient road, &c. (as the case may require) to be set out and made instead thereof, as convenient for passengers, cattle, and carriages, and for the transporting, &c. of goods or merchandize, as the said land, &c. so to be cut through, &c. as aforesaid, or as near thereto as may be, &c. (See the section set out at length, *ante*, Vol. 1, p. 617).

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ants. And, 3rdly, that there was no sufficient evidence given of the plaintiff's title to the wharf. And *Starkie*, in Easter Term, having obtained a rule *nisi* for entering a nonsuit or a new trial on the two first grounds,

Cresswell, *R. Alexander*, and *Martin*, now shewed cause (*a*). First, under the effect of the 69th section, the plaintiff is entitled to a new wharf. It was clearly shewn that the coroner's jury had not estimated that: the 10th section gives power to the Company to take lands; but if the land taken be a wharf, the 69th section applies. [They were stopped by the Court as to this point.]

Secondly, as to the rejection of Mr. Walker as a witness, who is made a proprietor by the 1st section. In *Doe* d. *Roberts* v. *Roberts* (*b*), the decision went on the ground of fraud. Here Parker was but a trustee for Walker, and in equity he would get his shares back again, *Platemorey* v. *Staple* (*c*). *Birch* v. *Blagrove* (*d*), was a case of a deed made by a man to disqualify himself from being sheriff of London, but not carried into effect, and the deed was held good. In *Ward* v. *Lant* (*e*) the property remained in the party. Here there was no objection as to the honesty of the transaction; and it is doubtful whether the Court can inquire into the ruling of the Judge. There was no collusion, Parker was not to hold for his own benefit; he took the shares on a mutual understanding, not to hold them afterwards. The witness being bound in honour is immaterial; he must have a legal or equitable interest, *Parker* v. *Whitby* (*g*). Here, Walker was a member of the Company from the beginning; there was no proof of the shares having passed to Parker pursuant to the provisions

(*a*) June 12th, 1840, before Lord *Abinger*, C. B.; *Alderson* and *Rolfe*, Bs.

(*b*) 2 B. & A. 367.

(*c*) Cowp. 250.

(*d*) Ambl. 264.

(*e*) Precedents in Chancery, 182.

(*g*) 1 Turn. & Russ. 372.

of the 114th (*a*) and 115th (*b*) sections of the act, which require a consideration to pass when shares are transferred, which should be strictly looked into. *Irons* v. *Smallpiece* (*c*). [*Alderson*, B.—You should have cross-examined as to that.] It is doubtful whether, where an original proprietor is offered as a witness, anything can make him admissible. This witness was certainly not so, for he had at all events an equitable interest.

Starkie, Sir *W. Follett*, *Baines*, and *Hildyard*, contrà.—First, as to the effect of section 69; that which is the subject of restoration is that to which a *bodily* injury has been done; here there has been no such direct injury to the wharf, for no actual damage is proved. The plaintiff is entitled to a communication; but though his communication has been intercepted, the wharf is not inaccessible. The 26th section gives compensation where lands are injuriously affected; and this case comes under that provision. [*Alderson*, B.—The 26th section is to be an additional protection to that given by the 69th section.] Injury may mean any sort of injury within the 26th section; *Rex* v. *The London Dock Company* (*d*) shews the meaning of the word. As far as regards the high road, the 69th section applies, as to the wharf, the 26th. The words "*any part*," in the 69th, are important, they must refer to something actually touched. As regards highways, you are not bound to do anything, if you do not cut through

(*a*) Section 114 enacts, that the shares shall be deemed personal estate, and transmissible as such, and not of the nature of real property.

(*b*) Section 115 gives the power and form of the sale and assignment of shares, which is to be in writing, reciting the consideration, and being executed by both parties, is to be kept by the clerk of the peace, who is to enter a memorial thereof in a book, and indorse the entry of the memorial on the deed, until which no interest is to pass to the purchaser or assignee.

(*c*) 2 B. & A. 551.

(*d*) 5 A. & E. 163.

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them. *Rex* v. *Pease* (*a*). The injury in the 69th section must mean a direct, not a consequential one; unless the property be actually cut into or through, it is not within that section. [Lord *Abinger*, C. B.—It is true you do not cut off any part of the wharf, but you divide it from the river; is not that an injury? The railway, if not used at all, would injure the wharf.] But that would not be within the 69th section. The defendants admit they are bound to make a good communication. [*Alderson*, B.—In other parts of the act are provisions for compensation for *damaging*, though there has been no bodily injury.] The Company are not to make a new wharf because the communication is injured, there is nothing in the act directing that, and no principle justifies it; all they have to do is to restore the intercepted communication, not to give the plaintiff a new wharf. [*Alderson*, B.—Must not things be done to make the wharf as convenient as before?] That is what they proposed to prove they intended doing. The plaintiff might have treated with the Company under the 26th section; but he has no other remedy than by a compensation jury; and that he would have if the 69th section were not in the act.

Secondly, as to the rejection of evidence. Walker's name being in the preamble of the act is immaterial; no doubt the necessary forms of transfer were gone through, and that there was no question about it at the time. *Doe* d. *Roberts* v. *Roberts* (*b*), is an authority in point. [*Alderson*, B.—Has it ever been determined that a party could justify killing game under a qualification given by such a deed?] *Hawes* v. *Leader* (*c*), was cited in *Doe* d. *Roberts* v. *Roberts*, by *Holroyd*, J., to shew that, though a creditor may question such a deed, the immediate parties cannot. [Lord *Abinger*, C. B.—If a witness made a gift of the shares, and had nothing but the honour of the donee

(*a*) 4 B. & A. 30; 1 Nev. & Mann. 690.

(*b*) 2 B. & A. 367.

(*c*) Cro. Jac. 270: Yelv. 196.

to depend upon, he would be admissible; but if he had either a legal or an equitable interest, then he would not.] The Court of Chancery has the power of directing transfers to be returned, but the Lord Chancellor would not listen to an application of such a nature as this. The witness states, his shares were transferred in a proper manner; that, according to the 115th section, would be under his seal; no court of equity would set that aside. [Lord *Abinger*, C. B.—If he did not mean it as a gift, it would be set aside, though under seal. *Alderson*, B.—They have parted with their *legal* estate.] The plaintiffs ought to have shewn that they had an equitable interest. [Lord *Abinger*, C. B.—Is it to be supposed that the grantee had no idea of the reason why the shares were transferred to him?] The operation in the minds of the parties would not be considered by the Lord Chancellor unless there were an agreement; he would help to forward a fraud in a court of justice, if he interfered in such a case as this. Here is an attempt to impose upon the Court. The use of the word, "*honour*," showed Walker's disclaimer of any estate, legal or equitable, in the shares; and an invasion of the law in this instance, as in the case of qualifying to kill game, cannot be remedied by a court of equity. A creditor of Parker's seizing these shares could retain them. [*Rolfe*, B.—*Brackenbury* v. *Brackenbury* (*a*) is a case similar to this.] That was a delivery as under a deed, not as an escrow. The defendants are therefore entitled to have a nonsuit entered, if their construction of the 69th section be the right one; or to a new trial, if a communication only is required, or if the rejected evidence was admissible.

Lord ABINGER, C. B.—We must take time to consider this case, as it comes from the Court of Chancery. At present, I think the construction of the word *injured* in

(*a*) 2 J. & W. 391.

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the 69th section is as argued for the plaintiff. We will also consider what is to be done about the witnesses, as an equitable interest excludes as well as a legal one.

ALDERSON, B.—I doubt as to the inadmissibility of the witnesses, for they may have parted with both legal and equitable interest. As to the other point in the 69th section, I have at present no doubt.

Cur. adv. vult.

Lord ABINGER, C. B., now delivered the judgment of the Court. In this case the plaintiff declared that, at the passing of an act of Parliament for making a railway from Hull to Selby, he was possessed of a wharf on the river Humber; that the defendants, the proprietors of the railway, so injured this wharf as to render it inconvenient for the landing and shipping of goods; and that they had refused to make and set out for him another wharf instead thereof, as convenient for the landing and shipping of goods as the one so injured. To this declaration the defendants pleaded—First, not guilty (by the statute); Secondly, that the plaintiff was not possessed of the wharf as of his own property. On the latter issue the plaintiff is clearly entitled to a verdict; but the main question in this case arises on the general issue. This point depends on the construction to be put upon the 69th section of the act of Parliament in question, 6 Will. 4, c. lxxx. It was contended for the defendants, on the argument, that the injury to the wharf, which was under that clause to be compensated by the erection of a new wharf, must be an injury done by acts *ejusdem generis* with those specifically mentioned in the clause, such as, by "cutting through, raising, sinking, or taking away" the wharf itself, and must have reference to some *bodily* injury done directly to the wharf. We think, however, that such is not the right construction of the act. A liberal inter-

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pretation ought to be put upon clauses of this kind. The plaintiff's wharf has been rendered comparatively inaccessible, and its usefulness for the landing and shipping of goods nearly destroyed, by the railroad which now cuts it off from the river; and it would surely be putting a most unreasonably strict construction on the act of Parliament, to say that the wharf is not thereby very considerably injured. The 26th section of the act does not afford the plaintiff the remedy he requires and is entitled to. If the case rested here, the plaintiff would, on the construction which we think the act of Parliament ought to receive, be entitled to have the verdict entered for him on the first issue. The next question is, how far the case is altered by the alleged compensation obtained by the plaintiff before the sheriff. That question, however, does not arise on these pleadings. The case would have been different if the defendants had paid a shilling into court, and pleaded that the plaintiff had sustained no further damage; as it is, there is no issue which raises the question. The last point is as to the rejection of the evidence of certain of the proprietors of the railway. The principle of law relating to this point is clear enough; the only difficulty is its application to the present case. If the witnesses have really parted with all legal and equitable interest, they are competent; otherwise they are not. Now, this fact is left in some degree of ambiguity on the notes of the learned Judge. Some of the witnesses appear to have parted with one interest, others with both. Why they should have been tendered as witnesses it is difficult to see, because their evidence does not appear to be capable of throwing any light upon the construction of the act of Parliament. Upon the whole, however, as there appears to be a doubt whether the witnesses, or at least all of them, were properly rejected as incompetent, we think the rule must be absolute for a new trial.

Rule absolute.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1840.

HAWTHORN and Others, (Assignees of R. and J. P. ROBSON, Bankrupts), *v.* THE NEWCASTLE-UPON-TYNE and NORTH SHIELDS RAILWAY COMPANY.

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June 24th.

A railway Company entered into a contract, (dated Dec. 27, 1836), with certain builders, R. R. and J. P. R., for building a bridge, all necessary implements and materials to be found by the builders, with power to the Company, if, in the opinion of their architect, the said contractors should not proceed with sufficient expedition, to employ other or additional workmen to complete the works, giving seven days' notice of such intention; and, in such case, to use the cranes, machines, implements, and materials used on or about the works by the said contractors, who were to defray the extra expense so incurred. The contract also provided, that the Company should have a lien upon such machines, implements, and materials, as should, for the time being, be in and upon the land, as a security for the completion of the bridge.

On the 26th of July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods, timbers, &c., for building the bridge, had been previously deposited by them, on it and the land adjoining. These consisted of four kinds:—1. Those actually on the line of the railway, value 612*l.* 13*s.* 6*d.* 2. Those upon land adjoining the line of railway, (not the property of the Company, but inclosed and taken possession of by them under the act), value 634*l.* 13*s.* 9*d.* 3. Those deposited upon the line of a temporary railway, made by the bankrupts, over land not belonging to the Company, for the convenience of conveying materials. The value of these was 7*l.* 19*s.* 6*d.*; that of the materials of the temporary railway, 131*l.* 15*s.* 4*d.* 4. A crane, erected by the contractors at the end of the temporary railway, value £50.

On the 31st of July, the Company took possession of all these goods. On the 1st of August, they gave the seven days' notice, that other workmen would be employed; and on the 2nd, they took upon themselves the completion of the bridge, using some of the goods and retaining the remainder. In an action of trover, brought by the assignees of the bankrupts for these goods:—*Held*, that the Company had a lien on the 1st and 2nd classes, but not upon the 3rd and 4th, which, nevertheless, at the expiration of the notice, they had a right to retain and use about the work.

Where, in trover, the defendant justifies under a right to use the goods for a particular purpose, and within a particular locality, and he has used them in a different manner or locality the plaintiff should new-assign.

TROVER for materials, &c.—The declaration contained two counts—1st, laying the possession in the Robsons before their bankruptcy, and a conversion by the defendants after it; 2nd, in the plaintiffs, as assignees.

Pleas—1st, not guilty; 2nd, as to the first count, that the said R. R. and J. P. R., before they became bankrupts, at the said time when &c., in the said first count mentioned, were not lawfully possessed, as of their own

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property, of the said goods and chattels in the said first count mentioned; 3rd, also to the first count, that before the bankruptcy of the said R. R. and J. P. R., or of either of them, and before the making of the indenture thereinafter mentioned, and before the said time when &c., in the said first count mentioned, the said R. R. and J. P. R. were lawfully possessed, as of their own property, of the goods and chattels in the said first count mentioned; and that being so possessed, afterwards, and before the said bankruptcy, and before the said time when &c., in the said first count mentioned, to wit, on the 27th of December, 1836, by a certain indenture then made between the said R. R., and J. W. and J. R. therein respectively described, of the one part, and the defendants therein described as having been established under an act passed in the then last session of Parliament, intituled, &c. (*a*), of the other part—reciting that the directors of the said Company had accepted a proposal from the said R. R. for building a bridge over Willington Dean, in the township of Willington, in the said county of Northumberland, for the sum of £21,000, which said bridge was intended to form part of the line of the railway authorized by the said recited act, and was to be built according to the plans, elevations, sections, and specifications designed and prepared by J. G., of Newcastle-upon-Tyne, architect; and that the said J. W. and J. R. had, at the request of the said R. R., agreed to join in those presents, in manner thereinafter expressed, as his sureties; and that the directors of the said Company had appointed the said J. G. to be the architect and surveyor of the said works during their pleasure—the said R. R. did, amongst other things, in and by the said indenture, in consideration of the covenants in the said indenture contained on the part of the said Company, for himself, his heirs, executors, and administrators, covenant with the said Company, their succes-

(*a*) 6 & 7 Will. 4, c. lxxvi.

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sors and assigns, in manner following: that is to say, that he the said R. R., his executors or administrators, or some or one of them, should and would, at their own proper costs and charges, forthwith begin, and, in an expeditious and workmanlike manner, erect and finish the said bridge, agreeably to the said plans, elevations, sections, and specifications respectively; copies of which said plans, elevations, sections, and specifications respectively, had, for the purpose of identifying the same, been signed by the said R. R., J. W., and J. R., and also by one of the directors of the said Company; and that he the said R. R., his executors and administrators, should find and provide, at their own expense, all and all manner of centres, scaffolding, machinery, instruments, tools, tackle, ropes, boats, barges, lighters, carriages, cranes, and all other materials whatsoever, for executing and performing all the work whatsoever, necessary for the beginning, carrying on, constructing, completing, and finishing of the said intended bridge; and that the architect and surveyor for the time being should have free power to direct the progress of the works by the said indenture contracted to be performed; and in case the said R. R. should not comply with such orders as might be given by the architect and surveyor, or if in the opinion of such architect and surveyor the said R. R. should not proceed with sufficient expedition in the performance of the work as directed, it should be lawful for the said Company, or their architect and surveyor, to employ other or additional workmen to complete the works, on giving seven days' notice of their or his intention so to do; and that then and in such case, it should be lawful for the said Company to use and employ the cranes, or other machines, implements and materials, which, for the time being, should be used by the said R. R. in or about the said works, and whatever extra expense might thereby be incurred by the said Company, in completing the works thereby contracted to be performed in a

proper manner, and with proper expedition, should be defrayed by the said R. R., J. W., and J. R., their executors, administrators, and assigns. And further, that the said Company should have a lien upon such machines, implements, and materials, as should for the time being be in or upon the lands or grounds whereon the said bridge was to be built, as a security for the completion of the works by the said indenture contracted to be performed; the said R. R. by the said indenture agreeing to execute to the Company, and at his expense, all such deeds and instruments as the counsel for the said Company should advise for completing and confirming such lien and security. And the said defendants did further say, that the said R. R. afterwards, and after the making of the said indenture, and before the said bankruptcy, and before the said time when &c., brought to and delivered in and upon the lands and grounds whereon the said bridge was so to be built, as in the said indenture is mentioned, for the purpose of beginning, carrying on, constructing, completing, and finishing the said intended bridge, the said goods and chattels so brought to and delivered in and upon the same as aforesaid, in the possession of the said defendants. And the defendants did further say, that afterwards, and after the said goods and chattels had been so delivered upon the said lands and grounds, and before the said bankruptcy, and before the said time when &c., to wit, on the day and year last aforesaid, by the consent and delivery of the said R. R., the said defendants had the possession of the said goods and chattels; that the said defendants had from thence, and until the said time when &c., and still have possession, and a right to have and exercise the said lien, in the said indenture mentioned, upon the said goods and chattels, under and by virtue of the said indenture; and the defendants then had and received the said goods for the purpose aforesaid. And the defendants did further say, that they continually

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from thenceforth until and at the said time when &c., the said bridge during all that time and still being incomplete and unfinished, kept and retained possession of the said goods and chattels, in the said first count mentioned, as and for a lien, and by way of security for the completion of the works by the said indenture contracted to be performed, as it was lawful for them to do for the cause aforesaid, which was the said conversion in the first count of the said declaration mentioned. 4th and 5th—similar pleas to the last count. The plaintiffs in their replication joined issue on the 1st, 2nd, and 4th pleas; and to the 3rd and 5th, admitting the indenture, replied *de injuriâ absque residuo causæ*:—upon which issue was joined. The cause was tried before *Coleridge*, J., at the Northumberland Spring Assizes, 1838, when a verdict was found for the plaintiffs for £1387, subject to be reduced, or a verdict to be entered for the defendants, according to the opinion of the Court upon the following case.

The plaintiffs are the assignees of Robert Robson and John Prudhoe Robson, bankrupts; and the defendants are the Newcastle-upon-Tyne and North Shields Railway Company, incorporated under an act for making and maintaining a railway from the town of Newcastle-upon-Tyne to North Shields, with a branch thereout, in the county of Northumberland.

The bankrupts, R. R. and J. P. R., before the making of the indenture hereinafter mentioned, and before and at the time of their bankruptcy hereinafter mentioned, carried on business in partnership as builders; and were before their bankruptcy possessed, as of their own property, of the goods and chattels in the declaration mentioned.

After the passing of the said act of Parliament, the said R. R., with the consent of his partner, the said J. P. R., entered into the following indenture, which was

duly executed by the said R. R., J. W., and J. R., as his sureties, and by the said Newcastle-upon-Tyne and North Shields Railway Company under their common seal; which said indenture is as follows: (The case then set out the indenture as recited in the pleas, and also covenants contained in it, by Robson, to pay a penalty if the bridge was not completed within the time specified; and by the Company for the payment of £21,000, upon Robson's duly executing and performing all the covenants, &c., on his part; and a covenant by them to make satisfaction to the owners and occupiers of lands in the vicinity of the said bridge, which should be occupied or injured by carrying on and executing the intended works, and to indemnify Robson against any suit, &c. on account thereof. It then proceeded as follows):—

The said R. R. and J. P. R., after the making of the said indenture, had, before the bankruptcy of the said R. R. and J. P. R., begun and proceeded in and with the said bridge in the said indenture mentioned, and divers centres, scaffolding, machinery, instruments, tools, tackle, ropes, boats, barges, lighters, carriages, and divers large quantities of deals, timber, stone, iron, and other goods and chattels, corresponding with the goods and chattels mentioned in the declaration, the property of the said R. R. and J. P. R., were, before their bankruptcy, brought to and deposited upon the said bridge and adjoining land, for the purpose of being used, employed, and worked up in making and constructing the said bridge. The Company's engineer was in the habit of attending the work; their superintendant was there constantly. The engineer occasionally directed where the goods and chattels were to be put down. He also interfered when bad materials were laid down, but made no objection when goods of the contractors were taken away, which was occasionally done, to be employed in another

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public work in which they were engaged, but in which the defendants had no interest or concern. No schedule of the goods and chattels brought to be used by the said R. R. and J. P. R. in making the said bridge, was delivered to the defendants, or required by them from the bankrupts; who proceeded with the works until the 31st July, 1837, at which time the bridge and works were unfinished. A fiat in bankruptcy, bearing date the 31st July, 1837, was issued against the said R. R. and J. P. R., the acts of bankruptcy on which it was grounded having been committed by the said R. R. and J. P. R., on the 26th July. They were thereupon declared bankrupts, and the plaintiffs appointed assignees of their estate and effects, 13th September, 1837.

At the time of the bankruptcy the aforesaid goods and chattels, which had been furnished by the bankrupts for the purpose of building the said bridge, were lying upon the line of the railway and upon the adjoining land in the manner and proportion hereinafter described. The goods and chattels actually upon the line of the railway were of the value of 612*l.* 13*s.* 6*d.* The land over which the line of the railway passed, comprising a breadth of forty-four feet, was the absolute property of the defendants, having been purchased by them under the powers of their act. Another portion of the said goods and chattels, of the value of 634*l.* 13*s.* 9*d.*, was lying upon land adjoining the line of the said railway upon both sides thereof, and which had been inclosed within rails by the defendants. The land thus inclosed was not the property of the defendants; but under a provision in the above recited act, they had taken possession thereof, for the purpose of depositing thereon the materials used in constructing the line of railway and bridge, and for any damage thereto they were bound to make compensation to the owners. The residue of the goods (except a crane hereinafter mentioned), had

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been deposited on the line of a temporary railway made by the bankrupts over land belonging to a Mr. Armstrong, but in the occupation of the defendants, for the purpose of conveying the building materials from the Tyne to the bridge. The value of these last was 7*l.* 16*s.* 9*d.*, and of the temporary railway 131*l.* 15*s.* 4*d.* The bankrupts had also erected and fixed a large crane, value £50, part of the said goods, at the end of the temporary railway. The whole of the said goods and chattels are moveable, (except the wood and iron of the temporary railway, which was fixed in the land), and might have been removed without injury to the land. The said goods and chattels remained where they were deposited up to 31st of July, 1837, when a clerk of the defendants took formal possession thereof by their authority and on their behalf, and put one of their agents in charge thereof. On the 1st of August, they gave this notice to the bankrupts and their sureties, and to the solicitor for the petitioning creditor:—

"I hereby give you notice, that the works at Willington Dean are not proceeding with sufficient expedition; and that, at the expiration of seven days from the date hereof, I will, agreeable to the contract, cause other additional workmen to be employed, and hold you responsible for the amount. Dated this 1st day of August, 1837.

"John Green, Architect and Surveyor."

On the 2nd of August, the Company took upon themselves the completion of the said bridge, and in the building thereof have used part of the said goods and chattels, and since 31st of July have retained possession of the residue thereof, and refused to deliver up the same, and had the crane and implements in constant use after the expiration of the seven days' notice.

Since the making of the indenture, the Company at all times when they advanced money to the bankrupts, re-

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tained £10. per cent., as a security for the completion of the works, and at the date of the said fiat the amount of such per centage so retained was upwards of £500.

The question for the opinion of this Court was, whether under these circumstances the plaintiffs ought to recover, and to what amount in damages; if so, a verdict was to be entered for them for such damages as the Court should direct, with costs of suit; otherwise a verdict was to be entered for the defendants, with costs of suit.

The points for argument relied on by the plaintiffs were, First, as to all the goods and chattels; 1st, That no lien attached, because the defendants did not take possession of any part before the bankruptcy. 2nd, That if any lien attached, it was waived by the defendants' permitting the bankrupts to remove the goods and chattels at their will and pleasure. 3rd, That assuming the property in the goods to have passed to the defendants under the indenture, still the plaintiffs are entitled to recover; because such goods and chattels were at the time of the bankruptcy in the order and disposition of the bankrupts as reputed owners, with the consent of the defendants, the true owners.

Secondly, as to any goods and chattels which, at the time of the bankruptcy, were not lying on the line of the bridge over Willington Dean, that the plaintiffs are, at all events, entitled to recover the value of these goods and chattels; because the lien claimed by the defendants under the indenture, could only attach in respect of the goods and chattels actually lying upon the line of the bridge.

The defendants disputed all these points, and stated as an additional one, that if any goods or chattels were not contemplated by the deed, the plaintiffs cannot, under the present pleadings, recover in respect of them, as they ought to have newly assigned.

R. Alexander, (*Knowles* was with him), for the plain-

tiffs (*a*).—First, as to all the goods and chattels in the case mentioned. No lien or any other right to take or detain them ever attached to the defendants; because they did not take possession of them, or any part thereof, before the bankruptcy. In the indenture is to be found the only ground for suggesting such a right, but something more was contemplated to give this power. If the Company had taken possession under the clause, and had completed the proper deeds and securities, a lien would have existed; but the contractors were in the habit of sending the goods and materials away, and from first to last no act was done by the Company to assert a right to them till after the bankruptcy; therefore, they would remain in the assignees. There is a distinction between this case and *Rouch* v. *The Great Western Railway Company* (*b*), where there was an actual agreement contemplating bankruptcy, which is here contended to be against the policy of the law. The note to *Wilson* v. *Greenwood* (*c*), collects all the authorities on this subject. [*Patteson*, J.—This indenture does not in terms affect bankruptcy; the assignees might choose to continue the works.] But it does so in effect; they might or might not choose to do so, but the creditors ought to be protected. *Tripp* v. *Armitage* (*d*). There must be a possession to make the lien available; here none was taken directly or indirectly till after the bankruptcy, that is, after the law had vested the property in the assignees. [*Patteson*, J.—What more possession was there in *Crowfoot* v. *The London Dock Company* (*e*)?] There are several substantial distinctions in this case; there is a right for the workmen to remove the materials, and work in other places, which was not so there. Here, also, the goods were purchased at the expense of the bankrupts themselves, and the

(*a*) Before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

(*b*) *Post.*

(*c*) 1 Swanst. 481.

(*d*) 4 M. & W. 699.

(*e*) 2 C. & M. 637.

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Company owed them £500. In that case the Company had made advances, and the workmen were deeply in debt to them, so that there was an actual investiture by the Company of the property. There, also, a schedule of the materials placed for building the bridge, was made out and delivered over; and no control was exercised over the articles by the workmen. [*Patteson*, J.—They may particularize the things without changing the possession of them; after bankruptcy how does that case differ from this? The Court must have proceeded on the idea of constructive possession before bankruptcy]. If it be possible to conceive a case with every thing favourable for a lien, it is that case. Here there is no advance by the Company, no claim for interest in the property; but the bankrupts had the control throughout, and something more was to be done, for Robson was to execute other deeds to give a lien. And if any lien ever did attach, it was waived by the conduct of the defendants, in permitting the bankrupts to remove and otherwise deal with the goods at their own will and pleasure. Then, assuming the property in the goods even to have passed to the defendants under the indenture, still the plaintiffs are entitled to recover; because such goods were at the time of the bankruptcy in the possession, order, or disposition of the bankrupts as reputed owners thereof, with the consent of the defendants, the true owners thereof. [*Coleridge*, J.—How can there be actual ownership when there is a lien? The true owner must allow the reputed owner to exercise it. The deed only gives a lien for security of the completion of the contract; it does not convey the goods. *Patteson*, J.—If the bankrupts had the possession of the goods, the lien is gone, and the question of reputed ownership cannot arise.]

Secondly, as to such part of the said goods and chattels as at the time of the bankruptcy were not lying on

the line of the bridge. The plaintiffs are entitled, at all events, to recover the value of these; because the lien or other right claimed by the defendants under the indenture can only attach in respect of goods actually lying upon such line. The property was situated in different places; some was lying on the railway, and some on both sides of it. Now, unless that which is not on the line on which the bridge is to be built, is included in the lien, these articles are not recoverable. Then comes a claim for a temporary railway, made by the bankrupts, for an easy communication from the Tyne to their works, which power they would not have had unless the defendants had given the notice required by section 40, and there is nothing here stated as to their having done so. [*Coleridge*, J.—The case finds that land to be in their occupation.] Yes, but the property of Armstrong: and it is submitted, that if it was not theirs, lien would not attach at all; and if it was, it would not be rendered available, as the bankrupts were in possession after the day.

Watson (*Pulleine* with him) contrà.—The defendants have a lien on the goods sought to be recovered. These large public companies stipulate to complete their works in a specified time, and it is important that various parts of long lines should be finished at once; and the object of these clauses is, that the Company should have the advantage of works half completed with the scaffolding and materials, which, when worked out, would soon complete the bridge, but if taken away would oblige new contractors to begin *de novo*. [*Coleridge*, J.—Is it clear this clause contemplates the Company doing every thing? would a lien give them a right to use the articles?] It is not necessary for them to rely on that, they have pleaded that the detention is the conversion complained of. [*Patteson*, J.—If parties delay, or throw it up entirely, you might interfere; but there is no allusion to the total failure of the

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contractors. *Coleridge*, J.—There would be great injustice in your using the goods without paying for them.] Only to hold them for the lien, they admit that is the conversion. They say this deed is void, as being contrary to law or the policy of the bankrupt laws. In the third plea the deed is set out and allegations are made, to bring the parties within the conditions. There is no allegation that the deed is fraudulent or contrary to policy, how then can this be raised on the pleadings so as to impeach the deed? and how can it be said to be contrary to the policy of the bankrupt laws, when it has no reference to bankruptcy at all? *Wilson* v. *Greenwood* (*a*) was a case of three partners, and on a dissolution the share of the partner going out was taken at a valuation; then came a subsequent deed, which was held by Lord *Eldon*, C., to be in contemplation of bankruptcy; but this contract cannot be said to be so, or in reference to it, unless you import into it what does not belong to it, for the parties were solvent. What was said by Lord *Abinger*, C. B., in *Tripp* v. *Armitage* (*b*) was not necessary to the judgment of the case. In *Rouch* v. *The Great Western Railway Company* (*c*) the whole argument turned on its being a proceeding referable to bankruptcy; here the only question is of possession; after setting out the deed, it proceeds, that for the purposes of beginning, Robson brought to and delivered the goods, some actually on the spot, and probably all on some land of the Company. Is that such a possession as to create a lien? It is not because a party contracts to give further security for a lien, that therefore the lien does not exist, or that the deed was not to operate without such further assurance. [*Patteson*, J.—If the intent was to give the Company possession immediately, with a lien for the completion, the exercise of the lien would prevent any thing being done by the contractor towards completion.] This case is not

(*a*) 1 Swanst. 471. (*b*) 4 M. & W. 699. (*c*) *Post.*

distinguishable from *Crowfoot* v. *The London Dock Company* (*a*), which was argued particularly on these points, whether there was such a possession as to give a lien, and whether the goods were left in the order and disposition of the bankrupts. It was contended there, as here, that no possession was sufficient, and *Parke*, B., said, that there having been no advance of money makes no difference in the possession, and the schedule was only evidence to identify particular articles, not to give effect to the lien. Nor because the Company allows the bankrupts to take away part of the goods do they abandon their right to the remainder. The cases cited in *Crowfoot* v. *The London Dock Company* (*a*) are extremely strong: *Manton* v. *Moore* (*b*) shews such possession as the nature of the case would admit, that it is not necessary the possession should be exclusive, for a symbolical delivery was sufficient. *Collins* v. *Forbes* (*c*). If a lien can be so created, it is impossible to imagine stronger powers for it; the words used are "lien and security," and there is all the delivery and all the possession the circumstances would allow. [*Patteson*, J.—*Manton* v. *Moore* was not a case of lien.] No; but Lord *Kenyon*, C. J., defines what possession may be independent, if special.

Then, with regard to the position of the several articles. The first description of land is that on which the railroad and bridge are situated, and as to that there can be no doubt: but there is another class of goods, on land rather differently situated, and the case with regard to them is not so strong. But on the replication *de injuriâ* the question does not arise. We claim a lien, and allege possession, so as to shew that a lien attached. There ought to have been a new assignment, as there were some goods on the line and some off. They should have replied, that they claimed for other goods, according to the rule of pleading,

(*a*) 2 C. & M. 637. (*b*) 7 T. R. 67. (*c*) 3 T. R. 316.

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that where a declaration complains of trespasses on divers days and times, and the defendant pleads a license generally, he is bound to shew a license co-extensive with the trespasses proved, *Green* v. *Jones* (*a*); and that rule is not confined to trespass.

R. Alexander, in reply.—The declaration having stated generally the goods taken, and the plea answering the whole of the declaration generally, there is no necessity for a new assignment. *Freeman* v. *Pratt* (*b*): *Routledge* v. *Abbott* (*c*). As to the question of bankruptcy, the assignees are entitled to recover upon the grounds stated in the judgment of *Lawrence*, J., in *Gordon* v. *The East India Company* (*d*), that the Company should either have taken actual possession of the goods, or have given notice they were their property. In *Manton* v. *Moore* (*e*), there was a bill of sale. The meaning of the word lien in this case is, that it is to operate between the parties, not against third persons: as between Robson and the Company, it was to enable the latter to indemnify themselves, and that lien was to be assisted by further deeds. It is quite clear a considerable portion of the property was not on the line, and therefore there was not sufficient possession.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—The main question arises upon the proper construction of certain clauses in an agreement between the defendants and the bankrupts, and on their validity, in the event which has arisen of the bankruptcy of the parties on the one part. Several points have been discussed in the argument, it being submitted to us to decide not

(*a*) 1 Wms. Saund. 300 (*h*).
(*b*) 4 M. & W. 4.
(*c*) 8 A. & E. 492.
(*d*) 7 T. R. 237.
(*e*) Id. 67.

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only as to the verdict, but also the amount of damage. The most orderly method of disposing of them will be, first, to consider the agreement itself; secondly, the circumstances to which it is to be applied; and lastly, the conclusions from both, with reference to the pleadings in the cause.

The defendants, in the construction of their railway, having to throw a bridge over Willington Dean, entered into a contract with the bankrupts, who were builders, for that purpose. [His Lordship stated the contract.] We think it cannot be contended that this agreement, whether entered into by one subject to the bankrupt laws or not, bears any thing unlawful on its face. It has no professed or necessary reference to the event of bankruptcy; and assuming the solvency of the contractors, and that bankruptcy was not in their contemplation, and that they were the owners of the chattels to be affected by the deed; they might certainly stipulate with regard to them, as the contractors have by this instrument. Neither can there be any question as to the extent of its operation on the first branch, supposing that contingency should arise, and seven days' notice to be given, then the Company would clearly be at liberty to make use of all the implements and materials then in use by the contractors in and about the works, whether they continued to be on this or that precise spot. The wording of the latter part, which gives the lien, is more limited: the lien is to attach on such machinery, implements, and materials as for the time being might be in or upon the lands or grounds whereon the bridge was to be built: it would be in the nature of a shifting lien; as materials were brought upon the ground it would attach on them, but as they were worked up, and became part of the bridge, it would cease and merge in the actual property. If they, or any of the machines, &c., were removed elsewhere, not wrongfully, it would be lost; but the loss of the lien on the articles so

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and at the expiration of the notice might lawfully be retained, and used and employed by the Company in and about the work.

It only remains to refer to the pleadings, applying these facts to them to draw the right conclusion as to the verdict to be entered. The declaration is in trover, with two counts: the pleas are, to the first, not guilty, on which nothing turns; the others are in sets, the second and fourth traversing the possession of the bankrupts' assignees respectively; the third and fifth setting out the special agreement. It will be sufficient to consider the effect of the second and third. With regard to the first of these, if it stood alone, some question of nicety might arise, as to its application to the defence contemplated, and its sufficiency to furnish any answer with regard to the third and fourth class of the articles above enumerated. But it seems to us, the third plea is a sufficient defence for the Company. It must be remembered, no question arises on the goodness of the plea; we are only to consider its extent, and whether it has been proved. It commences by stating possession of the bankrupts, of all the goods and chattels mentioned in the first count; it then sets out the agreement with both clauses stated above; then avers, that before the bankruptcy, and after the making of the indenture, they brought the goods and chattels to and upon the lands and grounds whereon the bridge was to be built, for the purpose of constructing it, which lands and buildings were in the possession of the Company, and that after and before the bankruptcy the Company had possession of them by the consent and delivery of the bankrupts, and still had possession of them, and acquired the lien on them in the indenture mentioned, and had and received them for that purpose; and it concludes by averring the continuance of possession, for the same right, and for the same purpose, the bridge being still incomplete. To this plea, the replication, admitting the indenture, is *de in-*

jurid as to the residue. We have stated already, that this defence does not cover the whole grievance proveable under the declaration; but we think this objection received the proper answer at the bar. The plea professes to cover every thing in the declaration; it places all the goods and chattels within the prescribed limits, avers a possession taken and retained, wholly by virtue of the lien granted by the deed; and if the plaintiffs intended to rely on the use of any of the articles, or a possession of the articles, not within the local limits which made them subject to the lien, they should have newly assigned; and not having done so, these matters cannot be taken into consideration.

It is true a new assignment is a novelty in trover, and in assumpsit (*a*): that must be attributed to the practice antecedent to the New Rules, of giving nearly every matter in evidence under the general issue. Now these forms of action are made subject to the same rules of pleading as trespass, and consequently will follow them in every case; and as a new assignment would certainly have been necessary if the declaration had been in trespass, it will be equally so here. We are of opinion, therefore, that the verdict ought to be entered, on the third and fifth issues, for the defendants.

Verdict for the defendants accordingly.

(*a*) As to new assignments in *assumpsit*, see 1 Mann. & Gra. 720, n. (*b*): see also *Jones* v. *Senior*, 4 M. & W. 123; 6 Dowl. P. C. 701: *Reynolds* v. *Blackburn*, 7 Ad. & Ell. 161: *Crawshay* v. *Barry*, 1 Mann. & Gra. 235.

COURT OF COMMON PLEAS.

In Michaelmas Term, 1840.

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Nov. 11*th.*

DAVIS *v.* THE LONDON AND BLACKWALL RAILWAY COMPANY.

The declaration stated that the plaintiff was possessed of a certain house, situate, &c., and that the defendants (a Railway Company) were making a railway and excavations, &c., near thereto, and to a certain other house, whereupon it was their duty to take proper precaution in making the said railway, &c. But that the defendants, not regarding their duty, did not take, &c., but so carelessly, &c., proceeded in the works, without taking proper precaution to prevent the house near the house of the plaintiff from falling against the plaintiff's; that for want of due precaution on the occasion aforesaid, the said house near the house of the plaintiff gave way and fell against it, whereby, &c.:—*Held*, on general demurrer, that the breach contained a sufficient allegation of the injury to the plaintiff having been caused by the negligence of the defendants.

Precaution here is equivalent to *care and skill.*

CASE.—That the plaintiff before, and at the times of the committing of the grievances hereinafter mentioned, was possessed of a certain house, situate &c., and occupies the same, and therein carried on his trade and business of a gunsmith; that before and at the times of the committing of the said grievances, the said Company were engaged in the making of a certain part of a certain intended railway, near to the said house of the plaintiff, and near to a certain other house in the county aforesaid, situate near to the said house of the plaintiff, and were also then employed in making certain excavations in the earth near to the foundations of the said house, so near to the said house of the plaintiff as aforesaid; and thereupon it became, and was the duty of the said Company to use due care and skill, and to take due, reasonable, and proper precautions in and about the making of the aforesaid part of the said railway, and in and about the making the said excavations; so that for want of such care, skill, and precautions, the said house of the plaintiff, and his tools and implements of trade might not be damaged or destroyed, or the plaintiff in-

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jured in respect thereof. Yet the said Company, not regarding their duty in that behalf, but contriving and intending to injure the plaintiff, did not, nor would use due care or skill, or take due, reasonable, or proper precautions in or about the making of the aforesaid part of the said railway, or in or about the making the said excavations, upon the occasion aforesaid, according to their said duty, but wrongfully and negligently omitted so to do; and the said Company contriving and intending as aforesaid, heretofore, to wit, on &c., and on divers other days and times afterwards, and before the commencement of this suit, so carelessly, negligently, unskilfully, and improperly proceeded in the making of the said part of the said railway, and the said excavations, without taking due and proper precautions to prevent the said house, so near to the said house of the plaintiff as aforesaid, from falling upon and against the said house of the plaintiff, that afterwards, to wit, on &c., by reason of the careless, negligent, unskilful, and improper conduct of the said Company, and for want of due and proper precautions by them on the occasion aforesaid, the said house, so near to the said house of the plaintiff as aforesaid, gave way and fell with great force and violence upon and against the said house of the plaintiff, whereby the said house of the plaintiff then became and was greatly injured, &c. and destroyed, and rendered uninhabitable, and by reason of the several premises, divers of the tools and implements of the plaintiff used by him in his trade and business of a gunsmith as aforesaid, to wit, &c. of great value, to wit, of the value of £20, became and were broken, spoiled and destroyed, and wholly lost to the plaintiff, and thereby and for want of his said tools and implements of trade, the plaintiff has been hindered and prevented from carrying on his said trade and business of a gunsmith, to wit, from the day and year last aforesaid hitherto; and by means of the premises the plaintiff has also from thence hitherto been deprived of the use of his

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said house, and of the profits, benefits and advantages which he otherwise might and would have acquired from the possession and use thereof, and from carrying on therein his trade and business of a gunsmith as aforesaid, and thereby also the plaintiff has necessarily incurred divers expenses, to wit, to the amount of £20, in having his said house examined, and the nature and extent of the said damages, injuries, and losses ascertained, and in and about the removal of the ruins of his said house, and of such of his goods and chattels, as were not wholly destroyed, and in and about the removal of the said last-mentioned goods and chattels, and in and about the procuring of another residence, and otherwise in relation to the premises and matters aforesaid, and was and is otherwise injured, &c.—General demurrer and joinder.

The point marked for argument for the defendants was, that they were not bound in law to support the house, alleged to have injured the plaintiff's house by falling upon and against it. The plaintiff was to contend that the declaration contained a good cause of action against the defendants, the injury having arisen (as averred) by their negligent, careless and unskilful conduct (*a*).

Bompas, Serjt., (*W. J. Alexander* with him) in support of the demurrer.—This declaration sets out a duty, which does not, by law, fall upon the Company; that is in the nature of a breach, that they so carelessly proceeded in making the railway, without taking due precaution to prevent a house falling against the house of the plaintiff. The substance of that is, that it is the duty of the defendants to prevent one house near the railway falling against

(*a*) See *Matthews* v. *The West London Waterworks Company*, 3 Camp. 403: *Wild* v. *The Gaslight Company*, 1 Stark. 189: *Thicknesse* v. *The Lancaster Canal Company*, 4 M. & W. 172: *Sutton* v. *Clarke*, 7 Taunt. 29: and *Rex* v. *The Nottingham Waterworks Company*, 5 N. & M. 498.

another. There is no averment that by the negligence of the defendants the house gave way. [*Tindal*, C. J.—The question is, whether they have laid affirmatively a duty to prevent the house falling against another.] They have not averred affirmatively that the first house fell in consequence of their making the railway, or that they improperly made the railway, but in consequence of their not taking due precaution to prevent it. They expressly include a duty to prevent one house falling against the other; they ought not to do that unless they shew affirmatively that through the defendants' negligence the first house gave way. [*Tindal*, C. J.—This is a general demurrer to the whole declaration; if any part shews a good cause of action it is sufficient. Are there not here virtually two breaches, by reason of which several promises, &c.?] The damage here is founded on what is a bad cause of action: if so, the breach would go to the whole. The word "careless" must refer to the next antecedent, that is, the not taking proper precaution to prevent the house falling; and "on the occasion aforesaid" refers to the same. What are the due and proper precautions? [*Maule*, J. —There are two things alleged—1, That the house gave way for want of precaution; and 2, That it fell against the plaintiff's. He cannot say, "You shall not make the house fall;" but he may say, "If you do, you shall take care it does not fall against mine." If the giving way had been accidental, there would have been no cause of action against you, as a bystander, for not propping it up.] It was absolutely necessary to aver that the first house fell by our negligence; if it did not, we were not bound to prevent it falling against the other.

Butt, contrà (*a*), was stopped by the Court.

(*a*) See *Peyton* v. *The Mayor, &c. of London*, 9 B. & C. 725; *Jones* v. *Bird*, 5 B. & A. 837; *Brown* v. *Windsor*, 1 Cr. & J. 20;

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TINDAL, C. J.—The word "precaution" here is little more than expanding the words "care and skill." There has been too much stress laid upon it. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Wyatt v. *Harrison*, 3 B. & Ad. 871; *Dodd* v. *Holmes*, 1 A. & E. 493; *Trower* v. *Chadwick*, 6 B. N. C. 1; *Vaughan* v. *Menlove*, 3 B. N. C. 468; *Powdrick* v. *Lyon*, 11 East, 565; *Boydell* v. *Jones*, 4 M. & W. 446: and the cases cited in *Pinckney* v. *The Inhabitants of East Hundred Rutland*, 2 Wms. Saund. 379.

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Feb. 19*th*. *April* 22*nd*, 23*rd*.

The LONDON and BRIGHTON RAILWAY COMPANY, Plaintiffs.
F. COOPER, - - - - - - - Defendant.

The preamble of the London and Brighton act, after reciting that the establishment of a railway communication between London and Brighton will be of great public advantage, enacts (sect. 3)—That it shall be lawful for the Company to make and maintain a

THE bill stated the incorporation of the plaintiffs by an act of the first year of the reign of Her present Majesty: That the Company have made considerable progress in forming the railway and a branch to Shoreham harbour; that the branch railway was opened for public use in May, 1840, and that ever since passengers have been conveyed thereon, but goods did not begin to be conveyed thereon until some time after the opening: That Shoreham harbour has a western and eastern arm, and the western arm is the more convenient for landing goods: That the branch

main line of railway and branches, with all proper warehouses, wharfs, and all other suitable and proper works, communications, approaches, and conveniences attached to or connected with the same.

By the 12th sect. the usual powers are conferred on the Company for making and maintaining the railway, and (among others) to make or construct upon, across, or over any roads, &c., such roads, ways, cuttings, &c., as the Company shall think proper.

The Company having purchased a private wharf, separated from one of their terminus stations by a turnpike road, laid down on the road stone blocks, so as to form two runs or stone ways level with the road, for the purpose of facilitating the passage of goods from the wharf across the road to the station.

Held, that the Company were not authorized by their act to interfere with the road in such a manner.

An injunction, which had been granted to restrain the trustees of the road from removing the stone blocks, was dissolved, although in the opinion of the Court no damage could result from the stone blocks, either to the road or the passengers upon it.

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railway to Shoreham lies to the north of the turnpike road from Brighton to Shoreham, and a considerable part thereof runs in a line nearly parallel with the same road, and the harbour lies to the south of the turnpike road: That, in order that goods landed at the harbour might be conveyed on the branch railway, it became necessary that the plaintiffs should provide a communication between some wharf and the branch railway. [The bill then stated the purchase of a wharf at Shoreham harbour by the Company.] That, in consequence of the relative situations and levels of the branch railway, of the turnpike road, and of Shoreham harbour, no convenient approach for the carriage of goods can be made between the wharf and the branch railway, except by crossing the road on a level: That the Company have erected a station directly to the north of the wharf: That goods landed at Shoreham harbour may be conveniently and economically conveyed on the branch railway; and it is necessary that the same should, on being landed, be placed on carriages fit for passing on a railway, and that such carriages should be drawn by horses to the branch railway: That with a view to forming an approach or communication from the wharf to the branch railway, the plaintiffs were, in April, 1840, desirous to lower the surface of a part of the turnpike road to an extent in no place exceeding two feet, and to lay down rails across the road; and, on the 22nd of April, the solicitor of the Company sent to the defendant, who is the clerk and solicitor of the trustees of the turnpike road, (appointed under an act of the 4 Geo. 4), a letter, with a plan shewing the manner in which the Company proposed to lower the road. [The letter was stated.] That the lowering of the road would have improved the same: That on the 29th of May a meeting of the trustees of the road took place, and the chairman of the Company and some of the directors attended and explained the plan; and at such meeting the trustees adopted the following resolution — "Resolved,

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That the trustees cannot accede to the request of the Company:" That in consequence of the resolution, the Company have not lowered the road, or laid rails across the same; but previously to the 20th of November, 1840, they, without the consent of the trustees, laid down on the turnpike road stone blocks, so as to form a stone way across the road, and the stone blocks were so laid that the upper surface thereof is level with the surface of the road: That the stone blocks occasioned no injury to the road, and no inconvenience to persons passing along the same; but were so placed for the purpose of diminishing the power which would otherwise be required for pulling heavy goods across the road, and for preventing the injury which such crossing would otherwise occasion to the road: That, from the time when the stone blocks were so placed up to the present time, the Company have conveyed goods along the stone blocks in manner following—the goods have been placed in carriages fit for passing along rails, and such carriages have been passed across the road by means of a truck, whereon such carriages have been placed, and the wheels of which truck are of a construction fit for being used on turnpike roads: That such carriages have been drawn across the road by horses, and it is not intended to cross the road with locomotive engines: That, unless the carriages filled with goods were drawn across the road in manner aforesaid, the goods must be conveyed across the road in carriages of an ordinary description, with wheels fit for being used on turnpike roads: That if the stone blocks were not placed on the road, the conveyance of the goods across the road in carriages of an ordinary description would materially injure and cut up the road, and such injury is wholly prevented by means of the stone blocks: That immediately on the trustees being informed that the stone blocks had been placed on the road, they, on the 22nd of November, 1840, objected thereto. [The bill then stated a meeting of the trustees,

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at which it was resolved, that the stone blocks should be removed, and the fact of the resolution being communicated to the Company.] That it appears by such resolution, that the trustees intend to remove the stone blocks.

The bill charged, that F. Cooper was made the defendant thereto by reason of the provision, whereby trustees of turnpike roads might be sued in the name of their clerk, as contained in an act passed in the 3 Geo. 4. The bill prayed, that the trustees, their servants and agents, might be restrained from taking up, removing, injuring, or otherwise interfering with the stone blocks or stone way laid down or placed on the turnpike road in manner aforesaid, and for further relief.

Feb. 19th.

An injunction was on this day moved for ex parte; but the Vice-Chancellor directed notice of the motion to be given, and His Honor allowed notice to be given for the 20th, on which day, upon an affidavit that the defendant, on service of the notice on him, had stated, that he should not appear, and, on reading the 12th section of the act, His Honor granted the injunction in the terms of the prayer of the bill.

Mr. *Knight Bruce*, for the motion.

The defendant gave notice of a motion to dissolve the injunction, and supported the same by affidavits, the material purport of which was—

1st. That it would be dangerous to the public travelling on the road to permit the Company to cross the same on a level.

2nd. That the Company were bound to make a communication between the railway and the wharf either under the road by a tunnel, or over the road by a bridge, pursuant to the 27th section of their act.

3rd. That the stone way was inconvenient and dangerous.

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The following sections were commented on during the argument and judgments:—

The preamble of the act, reciting that the establishment of a railway communication between London and Brighton will be of great public advantage. The 3rd section, enacting, that it shall be lawful for the Company, and they are hereby empowered to make and maintain a line of railway and branch, or extended railways, with all proper warehouses, wharfs, landing places, tunnels, bridges, and all suitable and proper stations, erections, works, communications, approaches and conveniences attached to, connected with, or necessary for the same respectively in the line or course, and upon, across, under or over the lands delineated on the original and altered plans respectively. The 12th section, conferring on the Company the usual necessary powers for making and maintaining the railway, and (among others) to make or construct upon, across, under or over the railway or other works, or any lands, streets, hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings and fencings, as the Company shall think proper; and also to alter the course of any rivers, canals, brooks, streams or watercourses during such time as may be necessary for constructing tunnels, bridges or passages over or under the same; and also to divert or alter the course of any roads or ways, or to raise or sink any roads or ways, in order to carry the same over or under or by the side of the railway. The 27th section, enacting, that where the railway shall cross any turnpike road, either such turnpike road shall be carried over the railway, or the railway shall be carried over the turnpike road by means of a bridge.

Mr. *Jacob* and Mr. *Stuart*, in support of the motion to dissolve the injunction.—Acts of Parliament incorporating

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Railway Companies always specify the purposes for which the Companies are incorporated, and powers conferred by these acts are construed and regulated by the purposes so legislatively defined. The preamble of this particular act recites, that the establishment of a railway between London and Brighton, with certain branches, one of which is a branch to Shoreham, will be of great public advantage, therefore the powers conferred by the act must be construed with reference to the making the railway and branches. Particular sections of the act empower the Company for the purpose of making the railway and branch to deal with roads, but that is where either the railway or the branch cross roads. That is not the present case: the Company are mere passengers or carriers on this road; and, like other carriers, they must be content to use the road in the state in which the legally constituted guardians of the road have thought proper to place it. If the road is in an improper state, resort must be had to the proper legal remedies to compel the trustees to repair it; but the Company have no right to assume that duty on themselves contrary to the express wish of the trustees.

Mr. *Knight Bruce* and Mr. *Goldsmid*, contrà.—The preamble of the act contains the inducement to the Legislature to grant certain powers to the Company, but the making a railway, or a branch railway, is not the limited purpose of the act. Many other works are contemplated. By the 3rd section of the act, the Company are empowered not only to make a main line of railway and branches, but also all proper warehouses, wharfs, and all other suitable and proper works, communications, approaches, and conveniences attached to, connected with, or necessary for the same respectively; and the 6th section speaks of the railway and other works. The 12th section expressly enables the Company to make roads upon or across other roads. They may not lay down iron rails to carry their locomo-

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tive engines across a road, save in such manner or over such roads as the Legislature has specified; but for the purposes either of their railway or other works they may make a road across a road, doing as little damage as possible.

April 22nd.

VICE-CHANCELLOR.—Although I think there is a degree of obscurity in the question, yet, according to my construction of the act, the Company have been wrong in what they have done. They have done this,—they have made a wharf, which I suppose them to have a right to do, upon land of their own, bordering on the sea; and having land of their own adjoining to the railway, and immediately opposite to the wharf, they find it necessary to cross this turnpike road, which of course they would be entitled to do with carriages lawfully constructed for travelling on turnpike roads. But, then, they claim a right not only to cross the road, but also to alter the structure of it, by laying stones so as to form two runs across the road, in order that trucks carrying carriages may travel over easier, and not be subject to wear and friction, and that they, the Company, may thereby have a more easy transit from their wharf to their railway. The question is, whether this is within the meaning of that power enabling them to make a road for the purpose of making an approach to a road. It is said, by the 3rd section, that the Company may make wharfs, and so on, with suitable conveniences and approaches; and the 12th section says, that, for the purposes aforesaid, it shall be lawful for the Company to make and construct over or across (among other things) any roads, such roads as the Company shall think proper, so that the question is,—Is this making a road across or over a road within the meaning of the act? I think it is not. It is a dealing with a turnpike road, not in the manner in which they have a right to deal with it, but by interfering with the property of the road, which is vested in trustees. It is not making a road, for the road

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is already made. It is not an alteration of a road, except so far as the introduction of new materials can be said to be an alteration. When the matter was first before me, I felt much doubt about the case, and I directed notice of the motion to be given, and after notice was given I was struck by the circumstances of the case; but, considering that the Company were asserting a right, and that to a certain degree there had been an acquiescence, and the application was made to prevent the trustees taking up the materials, and that, although I had directed notice to be given, nobody appeared for the trustees, I thought there could be no great harm in leaving things in their then state until the matter could be further discussed. My opinion now is against the lawful right of the Company, not to make a road for themselves, but to deal as they have done with the road belonging to the Shoreham trustees. I shall dissolve the injunction, reserving to the Railway Company a right to bring an action, which they will have an opportunity of bringing if one stone is removed. The Company must be allowed to try their abstract right at law. I shall reserve the consideration of costs.

The plaintiffs appealed.

Mr. *Knight Bruce* and Mr. *Goldsmid* for the appeal motion.

Mr. *Jacob* and Mr. *Stuart*, contrà.

April 23rd.

LORD CHANCELLOR.—I should be very glad if I could have found sufficient grounds to differ from the Vice-Chancellor, because I think what has taken place, if it is to be undone, would be a great inconvenience and expense to one party, and no benefit to the other. It is quite impossible to suppose there is any real injury to the turnpike road or any danger to those who traverse it. The carriages are to be detached from steam power, and are to be

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dragged across the turnpike road by horses. Now, sitting as I do in this town, to suppose there is any great danger to the lives of her Majesty's subjects from one street crossing another, is carrying a care for the preservation of human life beyond what I have any notion of. It is quite an imaginary apprehension, particularly when the carriages that are crossing must necessarily go so very slow, and when the road is so straight that you can see a considerable distance on both sides of the place of crossing. So, also, the turnpike road is left in as good a state as before, perhaps better, in the particular place where the stones are laid down. But I have not to consider whether the contest is or not worth entering into. The question which I have to consider is, whether I can find in this act any reasonable doubt that what the Company have done is supported by their act; and after paying great attention to the clauses to which I have been referred, I cannot find any one which gives them even a colour of title.

The 12th section, no doubt, is as large as possible in describing what the Company may do; but there are those words at the commencement which limit the whole operation, it must be for the purposes and subject to the provisions and restrictions of the act; not only, therefore, must you find words in the enacting clause sufficient to justify what is done, but you must find that what is intended to be done under that power is for the purposes and subject to the provisions and restrictions of the act. Now this railway runs to the north of this turnpike road; the railway, as it appears, was opened in May, 1840, and subsequently it was thought expedient to open a communication with a part of Shoreham harbour lying to the south of the road: and in order that the railway might communicate with that part of the harbour, it was necessary in some way to have a passage over or under the road. What the Company have done is this, they have carried the railway to the extreme northern side of the road, and then commencing

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from their works on the south side, they draw carriages from the south side across the road to the north by means of horses. Now, if this were done for the purpose of the railway itself, I think I should come to the conclusion that this was making a railway within the meaning of the 27th section; it is not less a railway, because in order to keep out of the provisions of that section the rails are not laid upon the turnpike road itself(a). If it is a railway within the meaning of the 27th section, then the Company are prohibited in express terms from crossing or dealing with this road in any way other than by going over it by means of a bridge, or under it by means of a tunnel. However, this is not for the purposes of the railway itself, and is therefore not a work within the meaning of the section. The purposes of the act were to make a railway or a branch communication; but I cannot understand what clause in the act authorizes the Company, in order to make a convenient road from the railway to some other spot, to deal with the road at all. There are provisions enabling the Company to deal with the turnpike road if it is for the purposes of the railway; but if they wish to make another road they cannot take the turnpike road for that purpose. Nothing in the act authorizes them to deal with the turnpike road in any way, except for the purposes and under the provisions and restrictions of the act. What the Company have done to this road is not for the purposes of the act, or within its provisions. If it is a common road of communication, made for the purposes of easy access to the railway, then I do not find anything in the act authorizing the Company to deal with the road at all. If, on the other hand, it is taken to be a branch railway, under the 27th section and the interpretation clause,

(a) The following definition of railways had been referred to in the course of the argument:—*Railway*—A road or way on which iron rails are laid for wheels to run on. *Webster's American Dict.*——A road or way on which iron rails are laid for wheels of vehicles adapted for it to run on. *Smart's Dict.*

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they cannot deal with it otherwise than as provided for in that clause. In no way have I been able to find such a doubt as would authorize me to interfere for the purpose of protecting the Company against the consequences of their trespass on the turnpike road. It is open to the Company to try the question if they please; but I cannot restrain the road trustees from exercising their legal powers: in the mean time the motion must be refused, with costs.

1840. *Dec.* 22*nd*, 23*rd*.

The LONDON and BRIGHTON RAILWAY COMPANY, Plaintiffs.
JOHN BLAKE and Others, - - - Defendants.

By the 59th section of the London and Brighton Railway Act, after reciting, that it is intended to carry the railway across certain public roads or highways in the parish of C., and to alter the levels or present surface of such roads, it is enacted, That all alterations, whether temporary or permanent, of, in, or to any of the said public roads or highways, and all works connected therewith, of any kind or description whatsoever, and all bridges to be erected by the Company, and all future repairs of such altered roads, or of any temporary roads, and the quality of the materials to be used and applied in or to such altered or temporary roads, and all future damage to such altered or temporary roads, shall be made, formed, completed, and finished under the superintendence, from time to time, and to the entire satisfaction of the board of surveyors of roads for the parish of C.

By the 60th section, it is enacted—That if the Company shall, in the doing, making, forming, completing, and finishing of all, or any, or either of such alterations or works in, to, or belonging to the said public roads or highways in the parish of C., do or cause any injury or damage to any or either of the said road or roads, or to any part thereof, and shall not forthwith proceed to repair and make good such injury or damage, to the satisfaction of the board of surveyors of the parish of C., or if the roads so to be altered shall not be properly made and completed and kept in repair, it shall be lawful for the said board of surveyors to cause such repairs to be done.

The Company made a diverted temporary road leading from one of the said roads, which diverted temporary road was crossed by the railway. The railway did not cross the old road, neither did the Company alter the level or surface of the old road. The Company also made and tendered to the surveyors a permanent diverted road, which the surveyors refused to approve of or accept.

The Company having in the execution of their works crossed the temporary diverted road with locomotive engines, the surveyors put up fences on either side, so as to obstruct the passage across it.

Held, That, even if the surveyors had, under the 59th and 60th sections, a jurisdiction to determine in what manner the diverted permanent road should be made, they were not justified in putting up the fences across the temporary road, but ought to have applied to this Court for an injunction, or to a Court of law for a *mandamus*.

That the right of the surveyors was a private right, and that they were in no way interested in the question of public safety.

Whether, upon the true construction of the act, such diverted temporary road was an alteration of a road within the meaning of the 59th and 60th sections—*quære?*

THE bill stated the incorporation of the plaintiffs by the above name and style. That, by the 3rd section of the

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Brighton Railway Act, the plaintiffs are authorized to make the railway. By the 12th section it is enacted, That, for the purposes and subject to the provisions and restrictions of the act, it shall be lawful for the Company to divert or alter the course of any roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway. By the 25th section, certain provisions are made for the making of roads, whether temporary or permanent, in lieu of any roads raised, sunk, taken, or injured in the exercise of any powers thereby granted. By the 59th section, certain provisions are made, directing that all alterations, whether temporary or permanent, of any public roads or highways in the parish of Croydon, shall be made under the direction of the board of surveyors of the parish of Croydon. By the 60th section, certain provisions are made for enabling such board of surveyors to cause to be done all such repairs and alterations of the public roads or highways in the said parish as shall not be properly made and completed by the plaintiffs in manner in the act mentioned.

That previously to the commencement of the railway works, two public roads, not being turnpike roads, crossed each other at a point on Croydon Common, in the parish of Croydon, and one of such roads led from the point of crossing, in a S.E. direction, to Beckenham, and the other from the point of crossing, W. to Thornton Heath, and E. to Addiscombe; and the line or course of the railway, as by the act authorized to be made, and as made, passed close to such point of crossing on the east side of such point, and intersected the road leading eastward from such point, at a distance of 305 feet immediately to the south of the point of crossing; and the level of the railway immediately adjoining the point of crossing, was one foot only lower than the level of the said several roads at such point; and it became necessary to raise the roads leading northward, eastward, and westward from the point of junction, and to

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carry the same over the railway by means of a bridge, and to divert the road leading southward from the point of junction. That in June, 1838, Mr. Rastrick, the principal engineer of the plaintiffs, submitted, pursuant to the 59th section of the act, to the board of surveyors of the parish of Croydon, a plan shewing the intended alterations of the roads; and according to such plan, the roads leading from the north, east, and west were to be raised and carried over the railway by means of a bridge and approaches thereto, and the road leading from the south was to be raised and diverted so as to pass immediately along the eastern side of the railway at a higher level, and to join the road leading from the east towards the point of crossing, at a point immediately adjoining to the eastern abutment of the bridge, and at a distance of sixty-five feet to the east of the former point of crossing; and, according to such plan, the bridge was to be thirty-six feet wide from N. to S., and such width, which is considerably more than required by the act, is proposed, in order to enable carriages, coming along either of the roads leading northwards and southwards towards the point of crossing, to turn or cross conveniently into the other of such roads. That on the 29th of September, 1838, two of the directors, and the principal engineer of the Company, had a meeting with the said board of surveyors, who then stated that the south approach to the bridge was dangerous, and that if the directors would consent, on behalf of the Company, to make a bridge at a place called Combe Lane, of a certain width, the surveyors would consent that the Company should not make any south approach leading directly to the bridge on Croydon Common, but instead thereof should divert the road on the south of the point of crossing towards the east, so as to join the east approach at some distance to the east thereof. That in reliance on such statements, the said two directors consented on behalf of the Company to make the bridge at Combe Lane as desired by the board

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of surveyors, and the same has been made accordingly. That no such diversion had been previously proposed by the plaintiffs. That it was necessary before the commencement of the bridge, and other works on Croydon Common, to make temporary roads; and in October, 1839, a temporary road was made, to be used instead of part of the road leading northwards to Selhurst, and southwards to Beckenham, and such temporary road was almost entirely fenced in, and the same commenced at a point in the old road, lying near the north-west corner of a yard belonging to a house purchased from a Mr. W., and at a distance of 300 feet to the south of the point of crossing; and such temporary road deviated from such old road towards the east, and crossed the road leading from the east towards the old point of crossing, 230 feet to the east thereof, and crossed the intended railway 300 feet to the north of the point of crossing the old road, and fell into the old road leading to Selhurst, on the west side of the intended railway, about 500 feet to the north of the old point of crossing.

That on the 30th of October, 1839, the resident engineer of the Company received from the board of surveyors a notice to the effect,—"That a meeting of the board would be held on the 2nd of November, and would be ready to inspect the plans, as finally arranged, of the operations on Croydon Common." That the meeting was held on the 9th of November, when Mr. Combe, the resident engineer of the Company, produced a plan, shewing the mode in which it was intended to make the bridge. That the board came to two resolutions as to the direction and mode in which the diversion of the road should be made. [The resolutions were set out.]

That the permanent diversion proposed by Mr. Combe, and since executed, is as convenient to the public as the diversion required by the said board, and such last diversion would have [for reasons stated in the bill] caused to the Company an extra expense of 2000*l.* That the diversion

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executed by the Company is more convenient to the public than the direct south approach, originally proposed by Mr. Rastrick. That it would be impracticable to make the diversion proposed by the board, as it would require lands which the Company are not authorized to purchase, and the same would make the south approach extremely dangerous.

That in the beginning of April, 1840, the railway had been made to the north and south of the point where the temporary road crossed it, and the level of the railway was three feet lower than the level of the temporary road at such crossing; and in the beginning of April, 1840, it became necessary to carry the railway across the temporary road, for the purpose of conveying along the same, in waggons drawn by horses, materials to be used in the railway works; and the fences of the temporary road were then removed at such crossing, and the same road was lowered two feet for the purpose of bringing the same nearer to the levels of the adjoining parts of the railway, and rails were laid across the same.

That, on the 11th of April, 1840, Mr. Penfold, one of the members of the board, complained to certain of the directors of the Company, that the descents from the temporary road were too steep, and the directors undertook to alter them as required. That Penfold then stated, in answer to inquiries by the directors, that he had nothing else to complain of. That the descents have been made as required. That it being necessary to use locomotive engines on the railway, the rails were, in May, 1840, removed from the crossing, and the temporary road was again lowered one foot, and the descents from the temporary road were made as had been previously required by Penfold, and the rails were then relaid.

That, previous to raising the road leading from the east towards the bridge, for the purpose of making the east approach thereto, it became necessary to make another

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temporary road, instead of the first temporary road. That, in July, 1840, the second temporary road was made along the east side of the railway, passing under one of the arches of the bridge, and falling into the line of the first temporary road on the west side of the railway, and near the point where the same road crossed the railway. That no alteration was made in the line of that part of the temporary road which crossed the railway. That the board having refused to alter their first resolution of the 9th of November, the Company nevertheless submitted to the board a plan, shewing the manner in which it was intended to divert the road, being the same as that proposed by Mr. Combe on the 9th of November. That the board refused to alter their own plan, and gave to the Company a notice not to proceed according to their plan; but the Company being advised that the board were not authorized to require them to incur great and useless expense, commenced at the end of August, and completed about the end of September, 1840, the diversion of the south road into the east approach, so as to fit the same for public use, and opened the same accordingly; the bridge, and the north-west and east approaches, having been some time previously opened for public use. That the first temporary road has been wholly disused since July, 1840; and since the end of September, 1840, the second temporary road has been very little used by the public, who have principally used the permanent diversion, and the east and north approaches. That, although the temporary road was, previously to the end of September, 1840, much more used than the same has since been, no objection was ever made by the board to the fences thereof being removed, or to rails being laid across the same. That, on the 18th November, 1840, the solicitor of the board delivered to the secretary of the Company the following resolution of that board. [The resolution was set forth.] That, it appears by such resolution, and the fact is, that

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the board of surveyors threaten, and unless restrained, &c. intend to place and erect a fence at the sides of such temporary road where the railway crosses the same. That the erection of such fence would wholly obstruct the railway, and render it impossible for carriages, waggons, or engines to pass along the same, and would greatly obstruct the works, and would render it impossible to open the railway for the use of the public, within the time which they propose, and would cause serious injury to the public and to the Company.

That J. Blake (and others) have, ever since the year 1838, been the board of surveyors of the parish of Croydon, appointed under the General Highway Act, (5 & 6 Will. 4.).

The bill charged acquiescence on the part of the board. That, ever since April, 1840, waggons have passed on the railway across the temporary road; and for some weeks past, locomotive engines have passed thereon, and the board, on the 18th of November, 1840, for the first time objected thereto.

The bill prayed that the defendants, their servants, and agents, may be restrained by &c., from placing or erecting a fence at the sides of the temporary road, where the rails of the railway cross the same, or from otherwise interfering with or injuring the said rails or railway, and for further relief.

On the 21st of November, Mr. *K. Bruce* obtained an *ex parte* injunction in the terms of the prayer of the bill.

The defendants gave notice of a motion to dissolve the injunction, and supported the same with affidavits, the material purport of which was:—That the Company had been in the habit of submitting their plans for interfering with roads to the surveyors, and acting according to their suggestions. That it was not until November, 1839, that the plans of the bridge and roads in question had been submitted to the surveyors. That, in April, 1840, the Company, without application to the surveyors, lowered

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the temporary road in a very inconvenient and dangerous manner, for the purpose of laying rails across it. That the board of surveyors remonstrated, and threatened legal proceedings. That, on the 11th of April, the Company gave orders to remedy the inconvenience complained of, and stated that they proposed to use the rails for conveying materials in waggons, drawn by horses; to which the directors, not apprehending any danger or inconvenience to the public thereby, did not object.

That the board of surveyors did not know or suspect, that, when the rails were taken up and relaid in May, 1840, it was for the purpose of crossing the temporary road with locomotive engines, or they would have objected thereto, as being highly dangerous to the public. That, on the 5th of October, 1840, Mr. Penfold, by direction of the board, required, by letter, that a fence should be put up by the side of the temporary road. That no answer was received to such letter, whereupon, on the 17th of October, the board resolved that a fence should be put up at the side of the temporary road, at the point nearest to the railway.

That the temporary road is a legal road, which it is the duty of the board to superintend; and that it is in a dangerous state. That, although the temporary road, *secondly* in the bill mentioned, has been lately opened, yet, that the first mentioned temporary road is the only legal road, and the same would be used by the public, were it not for the danger, by reason of locomotive engines crossing it.

Mr. *Jacob*, Mr. *Stuart*, and Mr. *W. T. S. Daniel*, moved to dissolve the injunction.

Mr. *K. Bruce*, and Mr. *Goldsmid*, contrà.

[The nature of the arguments, and the discussion upon the construction of the several sections of the act, are fully stated in the judgment.]

VICE-CHANCELLOR.—A question has been made in the *Dec. 23rd.*

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argument on this case, as to what is the authority given to the surveyors of the roads of Croydon by the 59th and 60th sections of the act; and it has been said—that under the terms which are used in the 59th section, the surveyors have a complete control as to the mode in which the diverted road shall be made. Now, the expression in the 59th section is this: "Whereas in making and executing the railway it will be necessary, and it is intended to carry the same across certain of the public roads or highways in the parish of Croydon, and to alter the levels or present surface of such roads; be it therefore enacted, that all and every alteration or alterations, whether temporary or permanent, of, in, or to any or either of the said public roads, or highways, within the said parish of Croydon, and all works connected therewith, of any kind or description whatsoever, and all bridges to be erected by the said Company across any or either of the said road or roads, to be made by the said Company under the provisions for that purpose contained in this act, and also all future repairs of such altered road or roads, or of any temporary road or roads, if any such shall be required to be made under the provisions of this act, and the quality of the materials to be used and applied in, or to such altered or temporary road or roads, and also all future damage of such altered or temporary road or roads, shall be made, formed, completed and finished under the direction and superintendence, from time to time, and to the entire satisfaction of the board of surveyors of the roads of Croydon." And in the 60th section it is enacted, "That if the Company shall, in the doing, making, forming, completing and finishing of all, or any, or either of such alterations or works, in, to, or belonging to the said public roads or highways, in the said parish of Croydon, do or cause any injury or damage to any or either of the said road or roads, or to any part or parts thereof, and shall not forthwith proceed to repair and make good such

injury or damage, to the satisfaction of such board of surveyors, or of such surveyor or surveyors of the said parish of Croydon, as aforesaid, for the time being; or if the said road or roads so to be altered as aforesaid, or any or either of them, shall not be properly made and completed, and kept in repair as aforesaid, then it shall be lawful for the board of surveyors to cause such repairs to be done."

Now, it has been said that, under those terms, the surveyors have a complete authority (of course, not to be capriciously exercised) to determine what is a proper road to be made, when the Railway Company, instead of doing that which the act of Parliament here particularly notices—carrying the railway across a public road, or altering the levels or present surface of the road—does a different thing; that is, makes a diversion of the road. Now, in the first place, I have looked at the interpretation clause, to see if there is any parliamentary exposition of the word "alteration," and there is none; and therefore I have to look at other parts of the act, in order to see what is the fair meaning of those words. In the 12th section, where the general powers are given to the Railway Company, power is given to "divert or alter the course of any roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway." Now, the expression "divert" there is used synonymously with "alter," because it says, "to divert or alter the course of." It is not "to divert or alter the road," but "to divert or alter *the course* of the road." When you look at the 45th section, which speaks of some roads near Godstone, it says: "Whereas it is considered advantageous that, instead of the railway crossing the turnpike road in its present line, the last-mentioned road shall be 'diverted;'" and then it proceeds to speak about a new line of road. And in the 49th section it says: "The portion of the old road which will lie between the

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points at which it shall be so 'diverted,' or turned, as aforesaid," shall be of a particular description. Then, in the 51st section, it says: "And whereas it is considered advantageous, instead of the railway crossing the road next hereinafter mentioned in its present state, to divert certain parts of the turnpike road leading from Foxley Hatch, in the parish of Croydon, into the town of Reigate, in the county of Surrey, and by means of bridges over the same road, as hereinafter mentioned, to carry the railway under certain parts of such turnpike road, and such last-mentioned parts of such road to be raised and heightened for that purpose,"—whereby certain events will happen. Then it uses this language: "And whereas plans and sections describing such diversions and alterations" are to be made. Now there it is perfectly manifest, that "diversions" is a term used by the act of Parliament as contra-distinguished from "alterations." Well, the same language is to be found in the 53rd section, and then in the 54th it is provided, "That, unless with the like consent of a majority of the said trustees, no part of the last-mentioned turnpike road" hereby directed to be "diverted or turned," as aforesaid, shall be taken. The legislature has there used the word "turned" as synonymous with "diverted." And when you come to the 58th section, you find it enacted, "That the Company shall pay all the reasonable costs and charges of the surveyor of the therein mentioned trustees for or relating to the said 'diversions or alterations';" whereas it is perfectly manifest, from what has preceded, that "diversion" is a term describing one thing, and "alteration" a term describing another thing. But when you come to the 59th section, and the 60th, it does not appear immediately that the legislature did advert to the necessity of making any diversion or turning. The language is this:—[His Honor again read the sections.]—I think it is fairly questionable, upon the terms which are used in those two sections, whether, if

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for the purpose of making the railway, the Railway Company do not cross the road, and do not alter the level, but do make a diversion from the road, that diversion is an alteration within the meaning of the section. I do not say that it is or that it is not, but it seems to me that it is fairly questionable. But one thing is pretty manifest upon this act, and that is this,—that by the 230th section it is enacted, "That if any person shall throw or place, or wilfully scatter or drop, any gravel or stone, or do any act, matter, or thing, to obstruct the free passage of the railway, or any part thereof, he, and every person actually or constructively assisting therein, shall forfeit and pay" a certain sum; and by the 232nd section it is enacted, "That if any person shall wilfully, and to the detriment of the said undertaking, or of the said Company, injure any part of the railway, such person shall be liable to" a certain penalty. Well, now, supposing there had been no legislative enactment upon the subject, *primâ facie* the obstructing of the railway, and the injuring of the railway, would be injurious to the Railway Company; and they are not less so because the statute has made the offence punishable in a given manner. Now what have the surveyors of the roads done in this particular case? Supposing that the largest construction in their favour is to be put on the 59th and 60th sections, it would only amount to this: that they would have a jurisdiction to determine in what manner the diverted road shall be made; and that would give them a right to apply to the proper Court, either to have a diverted road made in a proper manner directly; as, for instance, if they applied by mandamus; or they might apply to this Court, and, by means of a bill properly adapted to the subject, restrain the Company from making the diverted road otherwise than as it ought reasonably to be, to the satisfaction of the surveyors. But instead of doing that, (assuming that they have the full jurisdiction as to the formation of the

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road, which they claim), they have thought proper to take the law into their own hands, and they have thought proper to put down fences across the railway, of which the Company complain. I do not find the surveyors here as complainants, either by a bill of their own, or as relators and plaintiffs in an information and bill; but I find them merely here in the situation of persons who have a private right, under this act of Parliament, to regulate in some degree what the Company shall do; but because that which the Company have done is not pleasing to them, they take the law into their own hands, and think proper to interfere with the Company in a manner, which, as appears to me, was, independent of the express provisions of the statute, not warrantable by law.

Now, the only question is, whether this injunction shall be continued or not; and I cannot but think that, independent of the particular facts which are contained in the case, it never could be right that the surveyors of the Croydon roads should take upon themselves to determine and enforce the mode and manner in which they would stop what they called the illegal proceedings of the Company. There is no question but that these fences have been put across the road, and the surveyors cannot be heard here to speak on behalf of the public. The utmost of their jurisdiction would amount to this,—to take care that the road shall be properly made; but whether persons traverse the road with more or less danger arising from a collateral circumstance, appears to me to be a matter with which they have nothing to do; they are not the guardians of the public safety. My opinion is, that, looking at all the circumstances of the case, there has been at any rate quite sufficient acquiescence on the part of the surveyors in what the Company have been doing to make it improper that they should interfere in the way they have done; and therefore the motion for dissolving the injunction must be refused with costs.

[This case was afterwards compromised.]

D. PRESTON on behalf of himself and all other the Subscribers to and Members of the Grand Collier Dock Company, not Parties Defendants hereto, - - - - Plaintiffs,

THE GRAND COLLIER DOCK COMPANY, and the Directors thereof, and J. GUYON, W. GUNSTON, J. H. RITCHIE, C. DUNCAN, S. S. HALL, Sir W. HEYGATE, W. J. RICHARDSON, H. LUARD, J. W. HULME, J. HEYGATE, J. SMITH, S. GORDON, and R. N. BENNETT, - - - - - Defendants.

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December 7th, 8th, 10th, 21st.

Certain persons, proposing to solicit an act of incorporation for making docks, executed the usual parliamentary

THE bill stated that, previously to the 16th of February, 1837, certain persons proposed to form a Company for making wet docks near Rotherhithe and Deptford: that H. Hoppe, a solicitor, acting on behalf of such persons,

deed and deed of management; by the first whereof they bound themselves (*inter alia*) to pay the sums subscribed by each of them as the directors should appoint. By the second they agreed to be bound by all measures which the directors should think expedient or necessary for obtaining the act.

A bill for the above purpose passed the House of Commons. A standing order of the House of Lords provides, "That no bill, for making (*inter alia*) a dock, shall be read a third time unless] four-fifths of the probable expense of the proposed work shall have been subscribed for. To comply with this order and to make up the necessary capital, nine of the directors subscribed for 1000 additional shares each. The bill passed into an act, which provided (sections 94 and 95), That ten or more subscribers holding a specified number of shares might summon general meetings. Section 125—That subscribers should pay calls on shares as the directors should appoint, which shares the directors might declare forfeited on non-payment of calls. Section 132—Which enabled holders of shares to sell them, and prescribed the form of conveyance, and memorial.

Several of the shareholders, and, amongst them, the plaintiff, registered their shares, but the subscribers for the 1000 additional shares did not register. At the time of entering into the additional subscriptions, the directors subscribing signed a memorandum declaring, that the additional shares were held by them in trust for the Company. At a meeting of the directors a resolution was passed, "That the additional shares should be held in trust for the Company. At a special general meeting of the Company a resolution was passed—That the trust entered into for the Company should be annulled, and that the additional shares should be transferred to the secretary; and at a meeting of directors such resolution was subsequently confirmed.

The directors made two calls which were paid on the registered shares, but not on the additional shares. A third call having been made, and the plaintiff having not paid it, the directors were proceeding to declare his shares to be forfeited:

Held, that the transfer of the additional shares to the secretary of the Company without the specified form of conveyance and memorial was void. *That* the directors could not enforce the penalties imposed by the act on the non-payment of the third call on the plaintiff's shares until they had taken steps to compel payment of the first two calls on the additional shares.

That a suit for restraining the directors from declaring the plaintiff's shares forfeited was well framed by the plaintiff on behalf of himself and all other the members not defendants, against those parties as defendants who had subscribed for the additional shares.

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prepared the indenture called the parliamentary deed, and the agreement called the deed of management dated the 16th of February, 1837: that the said first indenture was made and executed between A. Gordon of the first part, J. S. Sedger of the second part, and the several persons whose names and seals are thereunto subscribed and affixed, of the third part; whereby it was witnessed, that A. Gordon did for himself, his executors, administrators, and assigns, and to the extent only of the sum or amount in money set opposite his name, and not further, covenant, promise, and agree with and to J. S. Sedger, his executors and administrators; and J. S. Sedger, and further each and every of the several parties thereto of the third part, did thereby for himself, and herself, and his and her respective heirs, executors, administrators, and assigns, but to the extent only of the sum or amount in money set opposite to his or her name, and not further, covenant, promise, and agree with and to A. Gordon, his executors and administrators. [The purport of the indenture was as follows: That the parties of the first, second, and third parts, had subscribed the sums set opposite to their names for the purpose of making the docks in such manner as a committee of management should think proper, and for forming other works in such manner as should be provided by an act of Parliament, to be applied for by the said committee, in which act should be contained the usual clause making the Company a corporate body, and providing for the non-liability of members beyond the amount of their respective shares; and, further, that the several persons parties thereto would well and truly pay or cause to be paid the amount subscribed by each of them, respectively, within five years from the passing of the act, at such times and in such sums as the directors should in conformity with the act direct or appoint.]

That the parliamentary deed was executed by several persons, and by the plaintiff for twenty shares; and the

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schedule to the deed contains the names and places of abode of the parties, and the number of shares such persons subscribed for, and the total amount of the subscriptions.

That the deed of management was entered into by persons subscribing the same for 255 shares (but was not signed by the plaintiff), whereby the several persons, who subscribed the same, recognised and acknowledged as a committee the eight first-named defendants, and T. Farncomb, A. Gordon, F. Mangles and T. Price; and they did severally and respectively for their several and respective executors and administrators promise and agree with the twelve last-named persons, their executors and administrators, that they severally, and their respective executors and administrators, would faithfully conform to and abide by the several rules and regulations as devised by the said committee until an act of Parliament should be obtained; and that such committee should generally adopt all measures, which they might consider necessary or expedient for obtaining an act of Parliament for the establishment of the undertaking. That the committee should have full power to enter into contracts and agreements with landowners, and to order and direct all other matters incident to the application for and soliciting the act. That the committee should have full power to make bye-laws for the government of themselves or any sub-committee. That 550,000*l.* should be the capital of the undertaking, to be divided into 11,000 shares of 50*l.* each. That a deposit of 1*l.* should be paid by each subscriber at the time of signing the agreement. That T. Farncomb never executed the parliamentary deed, and never acted as one of such provisional committee. That a bill was brought in and passed the House of Commons on the 29th of June, 1837. That at the time when the bill passed the House of Commons, the parliamentary deed was executed by thirty-four persons only, who subscribed for

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455 shares, forming a capital of 22,750*l.*, and, amongst such persons, were the defendants Guyon, Gunston, Hall, Ritchie, Luard, and J. Heygate. That one of the standing orders of the House of Lords relating to private bills is, —"That no bill for making (among other things) any dock shall be read a third time, unless four-fifths of the probable expense of the proposed work shall have been subscribed by persons under a contract, binding the subscribers, their heirs, executors, administrators, and assigns, for payment of the money subscribed within a limited time, nor unless there shall be contained in such bill, a provision that the whole of the probable expense shall be subscribed before the powers and authorities given by the bill shall be put in force. That four-fifths of the proposed capital is 440,000*l.* That after the bill had passed the House of Commons, the committee continued their exertions to obtain subscribers, and they succeeded in doing so, to the amount of 9530 shares, and among the subscribers were the defendants Richardson, Luard, Gunston, J. Heygate, Ritchie, Hall, Guyon and Duncan, each for an additional thousand shares of 50*l.* That on the 12th of July, 1837, a committee of the House of Lords reported that they had agreed to the bill intituled "An Act for making Wet Docks, or other Works on the south side of the River Thames, at or near Rotherhithe and Deptford, in the counties of Surrey and Kent, to be called 'The Grand Collier Docks.'" That such report was made upon the faith and confidence that the parliamentary deed had been duly executed, and that the parties executing had *bonâ fide* subscribed for and intended to become owners of the number of shares set against their names respectively, and had thereby become legally bound to pay the subscriptions. That the bill received the royal assent on the 13th of July, 1837. That by such act it was enacted (section 1), That the several persons therein named (amongst whom were the defendants Richardson and Ritchie), and all persons who had subscribed, or should thereafter sub-

scribe to the undertaking, their successors and assigns, should be united into a company, and should be a body corporate by the name and style of "The Grand Collier Dock Company," and by that name should sue and be sued. That by section 3, it is enacted, That the Company should raise money for the undertaking not exceeding 550,000*l.*, to be divided into shares of 50*l.* each. Section 6, reciting, that the probable expense of the undertaking would amount to 550,000*l.*, three-fourths whereof had been already subscribed for by the said several persons under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed, and enacting, that the whole of the 550,000*l.* should be subscribed for in like manner, before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the docks, and other works, should be put in force. Section 94, enacting that the first general meeting of the Company should be held within six calendar months next after the passing of the act; such meeting to be called by ten or more subscribers holding, in the aggregate, 500 shares; and all such, and so many special general meetings of the Company as the directors should think proper to convene, or as should be convened by the proprietors in manner in the act mentioned. Section 95, enacting that ten or more proprietors, holding, in the aggregate, 1000 shares, upon which all calls previously made should have been paid up, may require the directors to call a special general meeting. Section 98, providing, that in case at any general or special general meeting, proprietors to the amount of 1000 shares should not attend, such meeting should stand adjourned; and that the then directors should continue to act, and have the same powers as they then had, until new directors should be appointed. Section 99, specifying the scale of votes, being one vote for every five shares, and enabling shareholders to vote by proxy, and enacting that every

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question proposed in any general or special general meeting should be determined by the majority of votes present or proxies; and the determination of every such meeting upon any question, should be, and be deemed and taken to be the decision of the Company, notwithstanding any irregularity which might have occurred in giving or taking votes. Section 102, enacting, that no shareholder, who should not have paid up any call, should be allowed to vote, or to act as director, if objected to. Section 105, enacting, that at the first general meeting, twelve persons should be chosen as directors, being respectively possessed of ten shares. Section 106.—Directors to go out in rotation, and new directors being respectively possessed of fifty shares to be elected. Sections 107 and 108.—Directors going out in rotation to be eligible to be re-elected, and as to filling up death vacancies. Section 110, enacting, that the directors for the time being should have power to use the common seal of the Company, and should have full power and authority to do all acts for the management, regulation, and conduct of the affairs of the Company. Section 113, enacting, that the orders and proceedings of all meetings of the Company, and of the directors, should be entered in a book, to be signed by the chairman, and should be evidence in all courts of justice. Section 125, enacting, that the several parties who had or should subscribe to the undertaking should, and they were required, to pay the sums subscribed for by them respectively, or such parts thereof, as should from time to time be called for by the directors, under and by virtue of the powers of the act; and that in case any parties should refuse or neglect to pay the same, it should be lawful for the Company to sue for and recover the same in any court of law or equity, together with interest thereon at the rate of 5*l.* per cent. per annum. Section 126, enacting, that it should be lawful for the directors to make calls, no one call to exceed 5*l.*; and that if the owner of any share should neglect or refuse

to pay his share and interest, it should be lawful for the directors to declare such shares forfeited; provided that no advantage should be taken of such declaration of forfeiture until after notice given to the owner, and a confirmation of the forfeiture at a general or special general meeting; and that, after confirmation duly had, a general or special general meeting should have power to direct the directors to sell and dispose of such shares. Section 129, specifying the necessary evidence to be given in any action for calls. Section 132, enabling owners of shares to sell and dispose thereof, subject to the rules and conditions in the act mentioned, and specifying the form of conveyance to be used: and a memorial of such sale and transfer to be entered by the secretary or clerk of the Company in a book to be kept for that purpose. And, lastly, section 209, which enacted, that the said act should be deemed a public act, and be judicially taken notice of as such by all judges, justices, and others.

The bill also stated, that A. Gordon had lately died; that the three last defendants to the bill were his executors and personal representatives; that J. S. Sedger was made a party to the parliamentary deed, as a trustee on behalf of the other persons subscribing to the undertaking, with whom A. Gordon might (as he in fact did) covenant to pay the amount subscribed for by him: and A. Gordon, or his executors, having in all respects fulfilled the covenant entered into by him, J. S. Sedger, has and claims no interest in the deed, and is not a necessary party to this suit.

That, on the 12th of January, 1838, the first general meeting of the subscribers to the undertaking was held for the purpose of choosing directors, and that the following persons attended the meeting, namely, the defendants Gunston, J. Heygate, Hall, Ritchie, Richardson, Guyon, and Luard, and also the following persons—Mangles, Sedger, Simpson, Beatson, Travers, Smith, Price, Ord, Brown, Moxhay, Thanet, Allen, Scott, Pigott, and Irvine,

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holding among themselves 7321 shares. That, at such meeting, the defendants Gunston, J. Heygate, Hall, Ritchie, Richardson, Luard, and J. Guyon claimed to and did vote in the choice of directors, as the legal and *bonâ fide* holders of all the shares subscribed for by them. That, if the last-named defendants had not voted in respect of some of the shares subscribed for by them as additional subscriptions, there would not have been present at the meeting, personally or by proxy, ten or more proprietors entitled to vote in respect of at least 1000 shares. That, at such meeting, the nine first-named defendants, and also Mangles, Nelson, and Ord were chosen directors. That, the three last-named persons, and the defendant Hall, have ceased to be directors; and the only present directors are the other persons so chosen directors. That forty-eight members of the Company registered their shares, and the plaintiff registered his twenty shares; but that the defendants Gunston, Hall, Richardson, Ritchie, Luard, Guyon, Duncan, and J. Heygate did not register the 1000 shares subscribed for as a further subscription by them, making together 8000 shares.

That it is alleged on behalf of the last-named defendants, that they affixed their names or initials to the following memorandum:—"The shares subscribed this day by the provisional committee are to be held in trust for the Company, and to be allotted and sold only by a vote of the majority of the committee similarly subscribing; all benefits and profits in any way arising from the allotting or sale of such shares to be held by the Company, and not for the subscribers.—July 4th, 1837." That a meeting of the then directors was held on the 10th of June, 1839, attended by four directors, of whom the defendants Gunston, Richardson, and Ritchie were three, and pursuant to a resolution then passed, the following entry was made in the register book of the Company:—"1001 to 9000, both inclusive. These shares are held in trust for the benefit of

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the Company, by a memorandum dated 4th July, 1837." That, on the 27th June, 1839, a special general meeting of the Company was held, and that the members who attended, in person or by proxy, were the defendants Guyon, Luard, Gunston, Richardson, Ritchie, Hall, J. Smith, and J. Heygate; and also Mangles, Kid, Sedger, Sergeant, Price, Ord, Brown, Moxhay, Thomas, Allen, Scott, Piggott, and Irvine, holding amongst themselves 7369 shares; and unless some of the shares secondly subscribed for by the last-named defendants are to be taken and held as legally and *bonâ fide* subscribed for by the parties who originally subscribed for the same, there would not have been present at the meeting, personally or by proxy, ten or more proprietors of the Company entitled to vote in respect of at least 1000 shares; but the last-named defendants claimed to and did vote at such meeting, on behalf and in support of all the resolutions thereat, as the legal and *bonâ fide* holders of all the shares subscribed for by them. That, at such meeting, the following proceedings and resolutions took place, and the following entry was made in the books of the Company:—"27th June, 1839. The following proprietors were present, holding 7000 shares—[the above-mentioned twenty persons were named]. The Chairman directed the secretary to read the 96th and 99th clauses of the act, together with the advertisement by which the meeting was convened, namely, 'Notice is hereby given, that a special general meeting will he held for the purpose of authorizing the trustees under the memorandum of the 4th July, 1837, to renounce the trust for the benefit of the Company.' The Chairman read the memorandum of trust of the 4th of July, 1837, and explained the origin of the trust, and the purposes for which it was undertaken. That thereupon, the following resolution was carried unanimously:—'That the trust entered into for the benefit of the Company by the memorandum of the 4th July, 1837, be annulled; and that the 8000 shares so subscribed be

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now transferred to J. Smith, as the secretary of the Company, to be issued from time to time for the use of the Company by a vote of the board.'" That the alleged memorandum of the 4th of July, 1837, the resolutions of the 10th of June, 1839, and the entries made in pursuance thereof, and the resolution to transfer the 8000 shares to the defendant Smith, are not warranted by the act, and were made and entered into by collusion between the parties who had subscribed for the 8000 shares, and such of the directors of the Company as were present at the meeting for the fraudulent purpose of relieving the defendants [the parties subscribing for the 8000 shares] from their liability to pay the deposit of 1*l.* per share on the 8000 shares, and to pay the calls of money then contemplated to be made; and the said memorandum, resolutions, and entry are fraudulent, and tend to defraud and deprive the shareholders of the benefit of the subscriptions of 8000 shares, and the deposit of 1*l.* per share, and the calls made, and the future calls to be made. That, pursuant to such resolution, another entry was made in the register book, purporting that the 8000 shares had been transferred to, and then stood in the name of J. Smith, as secretary of the Company, in trust for the Company; thereby apparently reducing the capital of the Company from 550,000*l.* to 150,000*l.*, but no actual transfer of such shares was then made to J. Smith.

That some fraudulent agreement was made between the defendant Hulme and the directors, in respect of the 1000 shares subscribed for by him, and an entry was made in the register book of the Company, that Hulme held 1000 shares in trust for the Company.

That, on the 22nd of July, 1839, another meeting of the directors was held, which was attended by the defendants Guyon, Luard, Richardson, and Gunston, when it was resolved, "That a call of 5*l.* per share be made, and the registered proprietors be required to pay the same."

That, at the time when such call was made, 605 shares only had been and were duly registered, and such call was intended to be a call of 5*l.* upon 605 shares only, which was a fraud upon the proprietors of those shares, of whom the plaintiff was one, as the holder of twenty shares. That the last-named defendants, by whom the call was made, had each subscribed for 1000 shares as aforesaid, and they thereby fraudulently sought to deprive the Company of such call on those 1000 shares, amounting to 20,000*l.*

That, at a meeting of the directors held on the 29th of July, 1839, at which were present the defendants Guyon, Richardson, and Ritchie, and also Mangles, it was resolved, by the votes of the three first against the vote of Mangles, that the resolution of the 22nd of July, 1839, should be confirmed. That a general meeting of the Company was held on the 27th of September, 1837, when it was moved, seconded, and carried, "That the meeting approves of the resolution passed at the special general meeting held on the 27th of June, and hereby confirms the same." [Here followed an allegation as to the number of votes present, similar to that above stated with regard to the other meetings.]

That a deposit of 1*l.* per share has been paid on the 605 shares, and the call of 5*l.* per share paid upon all, or nearly all, the 605 shares, and in particular the plaintiff has paid such deposit and call on his twenty shares. That on the 28th of October, 1839, another meeting of the directors was held, and it was resolved, "That a further call of 2*l.* per share be made." That the amount of such call was paid on the 605 shares, and in particular by the plaintiff on his twenty shares.

That, with the exception of the defendants Guyon, Richardson, Luard, Gunston, Heygate, Hall, Duncan, Hulme, and Sir W. Heygate, the said deposit and calls have been paid by the several persons by whom the same

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have been paid, in ignorance of the frauds herein mentioned; and until long after the plaintiff had paid such deposit and calls he was wholly ignorant of the frauds aforesaid, and he paid the same on the full faith and confidence that all the shares subscribed for in the parliamentary deed were *bonâ fide* subscribed for, and the calls thereon paid. That since paying the said calls he has discovered, as the fact is, that the deposit has been paid on 605 shares only, and that the deposit and calls have not been paid on the 9000 shares subscribed for as aforesaid. That unless the deposit and calls on the 9000 shares be enforced, it will be impossible to carry the undertaking into effect.

[The bill then stated applications to the defendants, the present directors, to enforce payment of the deposit and calls on the 9000 shares, and to enter and register such shares in the names of the persons who had originally subscribed for the same, and to the defendants, the subscribers for those shares, to consent to the same being registered, and to take a certificate thereof, and to the representatives of A. Gordon, to enforce the covenants entered into with him in the parliamentary deed.] That the defendants, [the parties subscribing for the 9000 shares,] in order to give effect to the frauds herein complained of, threaten and intend to declare the 9000 shares to be forfeited.

The bill charged, that if the last-mentioned defendants respectively executed the parliamentary deed, and subscribed for 1000 shares, in order to satisfy the orders of the House of Lords, that they ought to be held to such subscriptions, otherwise such subscriptions would be a fraud upon the House of Lords, and upon the other subscribers to the undertaking. That the memorandum of the 4th of July, 1837, and the trusts thereby attempted to be created, are frauds upon the other subscribers, and the resolutions, annulling the same trusts, and directing the 8000 and 1000 shares to be transferred to the defend-

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ant Smith, and such transfers (if made), and all entries in regard thereto, are fraudulent.

That the several defendants, who subscribed for such 9000 shares have repeatedly acted and voted in the affairs and management of the Company as *bonâ fide* holders of such shares, and the permitting such shares to be treated and considered as held in trust for the Company, would deprive the Company of 450,000*l.* capital, and would have the effect of rendering invalid or illegal every general and special general meeting of the Company, inasmuch as no one of such meetings was ever attended by ten or more members holding 1000 shares in the Company, exclusive of the 9000 shares; and the majority of votes at such meetings consisted of the 9000 shares. The bill charged collusion between the defendants, the present directors, and the subscribers of the 9000 shares. That the plaintiff never attended, or was present personally, or by proxy, at any of the meetings of the Company. That, at one time the plaintiff was desirous of selling his twenty shares, and had executed a deed of transfer, dated the 1st of August, 1839, whereby he proposed and intended to assign and transfer his shares to a Mr. Moloney, who was willing to accept such transfer, but, on presentation of such deed of transfer at the office of the Company for registry, the secretary refused to register the same, on the ground that the call of 5*l.* had not then been paid; and consequently such deed never was registered, or any memorial thereof entered in the books of the Company, and by reason thereof the same became of no force or effect. That Moloney has since, by deed-poll, dated the 27th of June, 1840, remised and released, and for ever quitted claim unto the plaintiff, his executors, administrators, and assigns, of all his estate, right, title and interest at law or in equity, of and in the said twenty shares; and that the plaintiff has not sold the same. That the amount of the call of 2*l.* per share had been paid to

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the bankers of the Company, and that no forfeiture, by reason of non-payment thereof, had been declared in conformity with the provisions of the act of Parliament, (clause 127).

That the members of the Company, not parties to the bill, except so far as the same is filed on behalf of them, are very numerous, being upwards of one hundred, and are, many of them, unknown to the plaintiff, and it is impossible to make all the subscribers or members of the Company, on whose behalf the bill is filed, parties thereto.

The bill prayed, that it may be declared that the defendants, Guyon, Gunston, Richardson, Luard, Ritchie, J. Heygate, Duncan, Hall and Hulme, are, *bonâ fide*, or, in the circumstances aforesaid, ought to be considered and treated as *bonâ fide* subscribers to the said undertaking, in respect of all the shares for which they subscribed the parliamentary deed of the 16th February, 1837, and are bound thereby; and that they respectively ought to perform and fulfil the covenants and agreements thereby respectively entered into by them; and that the two memorandums, dated the 4th and 5th of July, 1837, and all the acts, deeds, resolutions, and entries by which it has been attempted to give effect thereto, or the trusts thereby attempted to be created, may be declared to be illegal, fraudulent, and void; and that the entries, in respect of the 9000 shares, any or either of them, and any (if any) transfers thereof, may be cancelled or expunged; and that the said shares may be re-transferred into or entered in the names of the last-named defendants respectively, in the proportions in which such shares were subscribed for by them respectively in the parliamentary deed, as of some date between the 24th and 31st May, 1839; and that the last-named defendants may be decreed to pay to the Company the deposit of 1*l.* per share, and the amount of the two calls of 5*l.* and 2*l.* per share, on their said 1000 shares each, together with interest thereon, at the rate of

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5*l.* per cent. per annum, on the amount of the deposits and calls from the time the same ought to have been paid to the day of payment; and that the defendants, the Grand Collier Dock Company, and the directors thereof, may be decreed to treat the 9000 shares as *bonâ fide* belonging to and owned by the said defendants, [the subscribers], in the proportions of 1000 shares each, according to their original subscription for the same; and may be decreed to enforce personally against the last-named defendants, the payment of the deposit of 1*l.* per share, and the calls of 5*l.* and 2*l.* per share thereon; and also all further calls which may hereafter be made on the shares or proprietors of said Company on their 9000 shares; and that the Company, and the directors thereof, may be restrained from making any other call upon the shares of the proprietors of the Company, until the same defendants have paid the amounts of the deposits and calls already made on the 9000 shares; and that all necessary accounts may be ordered to be taken, and all necessary directions given and declarations made for the purposes aforesaid; and that the covenants of said parliamentary deed, may, if necessary, be put in force against the last-named defendants; that all necessary directions may be given for that purpose, and that the Company, and the directors thereof, may respectively, by the decree of this Court, be perpetually, and in the mean time, by the order and injunction of this Court, be restrained from declaring or from joining any person or persons in declaring the 9000 shares, or any of them, to be forfeited; and that all the defendants, except the Company, Gordon, Bennett, and Smith, may be decreed to indemnify, and save harmless the Company, and, in particular, the plaintiff, and the other persons on whose behalf this bill is filed, from all loss and damage arising from the matters and transactions aforesaid, or any or either of them; and that said Guyon, Gunston, Richardson, Luard, Ritchie, Heygate, Duncan, Hall,

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Hulme, and Sir William Heygate, may be decreed personally to pay the costs of this suit: and also that the Company, and the directors thereof, may, by the decree of this Court, be perpetually, and, in the mean time, by the order and injunction of this Court, be restrained from taking any further or other steps to declare or procure the forfeiture of the plaintiff's twenty shares, on the ground of the non-payment of either of the calls already made on the proprietors of the Company, or on account of any other matter or thing already passed or happened; and for further relief.

The defendants Guyon, Gunston, Richardson, Luard, Ritchie, J. Heygate, and Duncan demurred:—

"For that the plaintiff hath not by his bill made such a case as entitles him to maintain this suit against these defendants, or as entitles him in this suit to any discovery from these defendants, or any relief against these defendants in respect of the matters contained in the bill; and for further cause of demurrer, these defendants shew that it appears on the face of the bill, that the several other members or proprietors of and subscribers to the Grand Collier Dock Company, not parties to the bill, are necessary parties thereto, and yet the plaintiff hath not made such several other members or proprietors of and subscribers to the Company, or any or either of them, parties or a party to the bill."

The defendant Hall also demurred.

Mr. *Jacob*, Mr. *Russell*, Mr. *Heathfield*, and Mr. *Craig* in support of the demurrers:—

This case does not fall within the rule of this Court, which regulates charities, and which is laid down in *Lowten* v. *The Colchester Corporation* (*a*). Previously to the Municipal Corporation Act (*b*), where a corporation was deal-

(*a*) 2 Mer. 113. (*b*) 5 & 6 W. 4, c. 76.

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ing improperly with property of which they were merely trustees, this Court interfered, but if it was strictly corporate property, the act of the majority bound the minority. The Municipal Corporation Act has declared all corporate property to be trust property, and this Court now exercises jurisdiction over all corporation funds.

The allegation in the bill, that the acts complained of amount to such a malversation of the funds of the Company as will prevent the purposes of the act being carried into effect, forms no ground of equity in this Court. In *Lord Petre's case* (*a*), the provisional committee of the Eastern Counties Railway Company had made an improvident bargain with a landowner, who sought to enforce it in this Court, admitting, by his bill, that the performance of the agreement would withdraw such a portion of the capital of the Company as would prevent the completion of the railway. This Court, nevertheless, upheld the agreement.

Where relief is founded on fraud, the particular fraudulent acts must be stated; a mere general allegation of fraud is insufficient. The only particular charge of fraud stated in this bill is, that certain shareholders have colluded to defraud others, by means of a memorandum and certain resolutions, but these were the acts of the majority of the Company present at public meetings; there is no averment of *suppressio veri* or *suggestio falsi*, no allegation of a fraudulent procuration of any shareholder to vote for these measures. The shareholders were liable for calls as long as they held shares: their responsibility was to find an assignee of their shares: it resembles the liability of the assignee of a lease, who is answerable to the landlord for rent until he has got rid of the lease by assigning it to a party who may be utterly insolvent. In a late case (*b*) it was held, that an executor was liable for a *devastavit* in not having assigned

(*a*) Ante, Vol. 1. 462. Rep. (N. S.) Chanc. 35.
(*b*) *Rowley* v. *Adams*: 9 Law, J.

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over an onerous lease to an insolvent party. The defendants, even if they can be considered trustees, consulted their *cestui que* trusts at the public meetings, and have conformed to their directions as to the disposal of the trust property.

A bill of this nature does not resemble a creditor's suit, where one party may be plaintiff on behalf of himself and others who may not intervene until after decree, every member of the Company must be a party either plaintiff or defendant. *Longe* v. *Yonge* (*a*), *Van Sandan* v. *Moore* (*b*), *Jones* v. *Garcia Del Rio* (*c*), *Hichens* v. *Congreve* (*d*).

Those members of the Company therefore, who are not named defendants, must be taken to be plaintiffs; but the particular acts complained of are said to have occurred at the two public meetings of the Company, and the bill represents several shareholders, whom it does not name as plaintiffs, to have been present at those meetings, and to have concurred in the resolutions then passed. These parties then must be taken as plaintiffs on this record, and as such are filing a bill to be relieved against their own fraudulent acts; there is no allegation that they were induced by fraud to concur in those resolutions. These parties have not a common interest with the plaintiff in the relief sought, and the bill is demurrable on that ground.

The act has appointed a domestic forum for settling all disputes or differences among the Company themselves.

Mr. *K. Bruce*, Mr. *Wakefield*, and Mr. *Lovat* in support of the bill:—

With respect to the objection to the frame of the bill, it is a bill for the general weal of the whole Company, the purpose being to bring in funds which would otherwise be lost to the Company. The parties actually named defendants

(*a*) 2 Sim. 369.
(*b*) 2 S. & Stu. 509; 1 Russ. 441.
(*c*) 1 T. Russ. 297.
(*d*) 4 Russ. 562.

are plaintiffs *quà* their general rights as shareholders; defendants in their particular character of fraudulent withholders of what they have agreed to contribute to the common funds of the whole Company. Such was the case in *Bromley* v. *Smith* (*a*), and *Attwood* v. *Small* (*b*).

Even were all shareholders not parties, the bill distinctly alleges that they are too numerous to be made parties. *Cockburn* v. *Thompson* (*c*), *Adair* v. *New River Company* (*d*), *Meux* v. *Maltby* (*e*), *Attwood* v. *Small* (*f*). The only limitation to the rule furnished by those cases is where the bill prays a dissolution. That was the case in *Hichens* v. *Congreve* (*g*), *Van Sandan* v. *Moore* (*h*), *Evans* v. *Stokes* (*i*).

That some of the shareholders who are not named defendants may have concurred in the resolutions, cannot abridge the right of the plaintiff, who is a *quasi* trustee of the suit to obtain relief for the whole Company. This is not a case where the actual defendants are in a position to assert that other persons are in *pari delicto*, and liable to contribute with them to pay these calls: it is not a case where a breach of trust has been committed, and a few only of several trustees brought before the Court. *Munch* v. *Cockerell* (*k*), *Seddon* v. *Connell* (*l*).

The resolutions passed at the public meetings in no way exclude the general right of the Company. In *Vigors* v. *Lord Audley* (*m*), there was a clause in an act of Parliament, which, in effect, authorized the governing body of a Company to sign promissory notes, which they were about to do, but to do so fraudulently; the Lord Chancellor, by an *ex parte* order (*n*), restrained them.

(*a*) 1 Sim. 8.
(*b*) 9 L. J., N. S. 132. See p. 135.
(*c*) 16 Ves. 326.
(*d*) 11 Ves. 429.
(*e*) 2 Swanst. 277.
(*f*) 9 L. J., N. S. 132.
(*g*) 4 Sim. 420; 4 Russ. 574.
(*h*) 2 S. & Stu. 509; 1 Russ. 441. See p. 574.
(*i*) 1 Keen, 24.
(*k*) 8 Sim. 219.
(*l*) 10 Sim. 79.
(*m*) Unreported.
(*n*) 29th October, 1836.

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It has been said that there is no necessity to come to this Court, but that a public general meeting of the Company at large can give all the remedy which this Court can afford; the creation of a new particular forum to redress a grievance does not, without express words of exclusion, abridge the powers of a more ancient jurisdiction. *Morris* v. *Duke of Norfolk* (*a*). An arbitration clause in a partnership deed has ever been held not to exclude the jurisdiction of this Court. *Street* v. *Rigby* (*b*).

Mr. *Jacob*, in reply.

One object of the plaintiff's in filing this bill is to prevent his individual shares in this Company being forfeited; how can the other members be said to be interested in this portion of the relief? If one member of the Company had owed the plaintiff a debt, he might have added a prayer for an account and payment, and, as successfully, contended that all the other parties were interested in his being paid, to enable him the better to prosecute the suit. In *Vigors* v. *Lord Audley*, there was no provision made in the act of Parliament for calling a general meeting of the Company, except at the instance of the directors, who, being the parties whose acts were to be impugned by a general meeting, naturally refused to summon one; that was a clear fraud on the part of the directors. The present case is distinguished in this important particular, that a majority of the members at large may summon a special general meeting.

December 10th. VICE-CHANCELLOR.—Before I decide this point, I shall read over very particularly the act of Parliament, as also the allegations in the bill, because it has struck me, that the real object of this bill is to give a sort of validity to the rule of the House of Lords, for which, as I understand

(*a*) 9 Sim. 472. (*b*) 6 Ves. 815.

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it, the act has made no provision. It seems to me, that this was in the contemplation of the framers of this bill,—that whereas the House of Lords requires that before a bill shall be read in their Lordships' house a third time, it should appear that at least three-fourths of the number of shares were subscribed for; that it would be a sort of fraud on that rule if a subscription were made in such a manner as not permanently, and for all purposes whatever, to make those who had become subscribers to the three-fourth shares holders of them, so that they could not get rid of them, but must at all events be liable to pay the amount of their subscriptions.

Now, it is very remarkable that there should be such a rule in the House of Lords and no such rule in the House of Commons; and possibly there may be no such rule in the House of Commons, because the members of that house may consider that the rule itself would be inoperative unless clauses are introduced into the act to give the rule an operation. Therefore it may be, that though their Lordships may think it right there should be such a rule in their house, the House of Commons may think it right there should not be such a rule in their house; and although the House of Commons might have thought that the thing aimed at by the House of Lords might be effectually accomplished by introducing clauses into the act, yet the act is passed without any such clauses; so that it appears the legislature collectively did not think it right there should be any clauses in the act which should give such an effect to the rule of the House of Lords as that which the framers of this bill had supposed ought to be given effect to. It is with reference to that consideration that I think I must very particularly examine this act of Parliament, and see how far that which has been done has been legally done; because, if it has been legally done within the terms of the act, though to a certain extent the rule of the House of Lords would be

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rendered inoperative. But my would follow,—that the injunction of the House of Lords has not been carried into effect, because their Lordships have not so framed the act as to give it effect. I shall look into the case before I decide it.

Demurrer Hall.

VICE-CHANCELLOR.—In this case there are two demurrers; one by Mr. Hall, who has ceased to be a director, and the other by seven of the same persons with respect to whom a transaction termed fraudulent is alleged by the bill, on account of their subscribing for 1000 shares each.

The two cases of demurrer differ in this respect,—that Mr. Hall has ceased to be a director, and therefore, as against him, it does not appear that the same relief can be administered as can be against the seven other defendants; but it appears to me, that as to the seven, in respect of their being still directors, relief can be administered; for instance, that part of the relief asked,—that they may be restrained from taking any further, or other steps, to declare or procure the forfeiture of the plaintiff's shares. That stands in this manner. It appears that there was a deposit of 1*l.* paid, and a call subsequently made by the directors for 5*l.* per share, which was paid; and a call was made in October, 1839, for 2*l.* per share; and it appears, by a most detailed statement which is given in the plaintiff's bill, that this 2*l.* per share was paid by him to the bankers of the Company. Now, though it is true that, under the act of Parliament, in case the call on a share had not been paid, the directors might proceed to declare the share forfeited; yet I apprehend that, in a case where, before any declaration of forfeiture, the whole amount of what was due in respect of a call has been paid, and, as this bill states it, no order has been made to repay, this Court would not allow the directors to proceed to declare a share forfeited; because it is contrary to equity, according to the plainest sense and justice, that the parties

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should receive and keep in their possession the amount of a call, and after that proceed to declare the share forfeited. I think if the case stood only upon that, the demurrer of the seven defendants must be overruled. But then, inasmuch as the case of Mr. Hall stands distinguished from the case of the seven other defendants, I have to consider with respect to him what will also apply to them, namely, the general equity of the case. Without using the term fraudulent, which I think is a term in fairness hardly applicable to the transaction, the matter stands in this form,—whether these nine persons who subscribed for 1000 shares each did sign the parliamentary deed or not is quite immaterial, because they are stated on the face of the bill to have been subscribers for 1000 shares each. I observe that there is a little difficulty at first, upon the face of the bill, in determining the fact, whether there were such memorandums as are mentioned of the 3rd and 4th July, 1837; but though I observe that it is stated in the first instance, "that it is alleged there are such papers,"—which statement of itself does not amount to an allegation of the fact that there are such; and although it is charged, "that the defendants pretend there are such papers," and then the contrary of such pretences is charged, yet I do observe that the bill states that the papers are fraudulent, and were made and entered into for a fraudulent purpose. Now they could not "be fraudulent in fact," or "have been made and entered into" for any purpose unless they were actually made; they must have existed to have a quality or character. I observe, moreover, that the prayer of the bill is express as to them.—[His Honor read the prayer.]—I take it to be a fact sufficiently represented on this bill, that, for the purpose of enabling the act of Parliament to pass, the nine persons did procure further subscriptions to the amount of 9530 shares, of which each of the nine took 1000 shares. Whether, as I have observed, the

[illegible] whether the parliamentary deed or not is [illegible] became subscribers for the shares; but admitting they did take the shares in trust for the company they were the holders of the shares; and if they were trustees for the company they were still, by the provisions of the act, liable in all those operations which were to be performed by those who held shares; and though they might, as any other trustees may, have a right to be reimbursed by their cestui que trusts all expenses which they might incur in the execution of their undertaking, they are, I apprehend, primarily liable. It is quite impossible to read this act without seeing that it was the intention of the legislature that those who became shareholders should all of them pay rateably. Then what is done? The parties appear not to have managed their case in the way they might have done. As I understand the bill, even to this day there has been no transfer of the shares by the nine subscribers; the consequence of which is, that, let them state what they please with respect to an acknowledgment of the trust, and an intention to exonerate them from any liability as trustees, under the provisions of the act, they were clearly liable, when calls were made upon the shareholders; and this Court never would allow the directors of a company so to proceed, as partially to call upon some shareholders to pay a deposit and calls, and not call on the others. I therefore think, that, without imputing fraud, and it is obvious to me no fraud was intended, that the thing really intended was a benefit to all the subscribers, namely, that the act of Parliament should be passed, but it was contrived in this particular way, namely, that the nine persons in question should become shareholders for nine thousand shares,—my opinion is, that, in this respect, there has been an error which this Court will set right. When the directors thought proper to make a case, they stopped short of their duty; they ought to have gone on to direct the same sums to be

paid by each shareholder—by each of the holders of 1000 shares as directed to be paid by the other members. Therefore, whatever else is done, I think this Court will rectify the error that has been made, and will take care that all the shareholders shall be put upon an equal footing with respect to the liability to pay calls.

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My opinion is, that, upon the face of this bill, there is a plain equity for the plaintiff to be relieved, and therefore the demurrers must be overruled.

I think the bill could not have been constituted otherwise than it is by the plaintiff, on behalf of himself and all other the members, except the defendants; and the objection of want of parties is answered by the bill, which, in so many words, says, that there are upwards of one hundred persons. I think, that within the decisions that have been made on such points, the objection is bad, consequently in both respects the demurrers must be overruled (*a*).

(*a*) See the next case.

F. MANGLES *v.* THE GRAND COLLIER DOCK COMPANY (*b*).

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THE bill stated the proposal for the formation of the Company, the parliamentary deed, and the deed of manage-

The directors of a joint stock company, in order to comply with a standing order of the House of Lords, as a means of procuring an act of incorporation, subscribed for a large additional number of shares in the undertaking, and signed a declaration that they held them in trust for the Company, but did not pay the deposit on or register them. Subsequently, at a special general meeting of the Company, it was resolved that the trust should be annulled, and the shares transferred to the secretary, to be held by him at the disposal of the Company, and this resolution was confirmed at a subsequent meeting of the directors. The directors made calls on the registered shares, and proceeded to enforce payment of them:—*Held*, on demurrer, that the directors were liable in respect of the deposit, and all calls to be made on such additional shares, and that the same must be considered as *bonâ fide* subscriptions.

That they could not be considered as exonerated from such liability by the proceeding taken to annul the trust, and transfer the shares.

That the plaintiff, a registered shareholder, could not be relieved from his legal liability to pay calls on his shares, on the grounds, that the additional subscriptions entered into were fictitious and fraudulent, for the colourable purpose of complying with the order of the House of Lords, and that the capital of the undertaking, *bonâ fide* subscribed for, was inadequate to carry out the project.

Semble, the registered owner of shares in an incorporated Company does not, by a transfer of his shares, get rid of his legal liability to pay calls made previously to the transfer.

(*b*) See the last case.

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defendants subscribed the parliamentary deed or not is quite immaterial, they became subscribers for the shares; and admitting they did take the shares in trust for the Company, they were the holders of the shares; and, if they were trustees for the Company, they were still, by the provisions of the act, liable to all those operations which were to be performed by those who held shares; and though they might, as any other trustees may, have a right to be reimbursed by their *cestui que* trusts all expenses which they might incur in the execution of their trusteeship, they are, I apprehend, primarily liable. It is quite impossible to read this act, without seeing that it was the intention of the legislature that those who became shareholders should all of them pay rateably. Then what is done? The parties appear not to have managed their case in the way they might have done. As I understand the bill, even to this day there has been no transfer of the shares by the nine subscribers; the consequence of which is, that, let them state what they please with respect to an acknowledgment of the trust, and an intention to exonerate them from any liability as trustees, under the provisions of the act, they were clearly liable, when calls were made upon the shareholders; and this Court never would allow the directors of a company so to proceed, as partially to call upon some shareholders to pay a deposit and calls, and not call on the others. I therefore think, that, without imputing fraud, and it is obvious to me no fraud was intended, that the thing really intended was a benefit to all the subscribers, namely, that the act of Parliament should be passed, but it was contrived in this particular way, namely, that the nine persons in question should become shareholders for nine thousand shares,—my opinion is, that, in this respect, there has been an error which this Court will set right. When the directors thought proper to make a case, they stopped short of their duty; they ought to have gone on to direct the same sums to be

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(*a*) See the next case.

F. MANGLES *v.* THE GRAND COLLIER DOCK COMPANY (*b*).

1840. *February 15th.*

The directors of a joint stock company, in order to comply with a standing order of the House of Lords, as a means of procuring an act of incorporation, subscribed for a large additional number of shares in the undertaking, and signed a declaration that they held them in trust for the Company, but did not pay the deposit on or register them. Subsequently, at a special general meeting of the Company, it was resolved that the trust should be annulled, and the shares transferred to the secretary, to be held by him at the disposal of the Company, and this resolution was confirmed at a subsequent meeting of the directors. The directors made calls on the registered shares, and proceeded to enforce payment of them:—*Held*, on demurrer, that the directors were liable in respect of the deposit, and all calls to be made on such additional shares, and that the same must be considered as *bonâ fide* subscriptions.

That they could not be considered as exonerated from such liability by the proceeding taken to annul the trust, and transfer the shares.

That the plaintiff, a registered shareholder, could not be relieved from his legal liability to pay calls on his shares, on the grounds, that the additional subscriptions entered into were fictitious and fraudulent, for the colourable purpose of complying with the order of the House of Lords, and that the capital of the undertaking, *bonâ fide* subscribed for, was inadequate to carry out the project.

Semble, the registered owner of shares in an incorporated Company does not, by a transfer of his shares, get rid of his legal liability to pay calls made previously to the transfer.

THE bill stated the proposal for the formation of the Company, the parliamentary deed, and the deed of manage-

(*b*) See the last case.

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ment; the execution of the parliamentary deed by the plaintiff; the passing of the bill in the House of Commons; the standing order of the House of Lords; the additional subscriptions; the passing of the act; and the several clauses of the act, as stated in the last case (*a*).

That the act of Parliament did not name the directors of the Company. That, on the 12th of January, 1838, an illegal or pretended meeting was held, for the purpose of choosing directors, and the following persons attended in person, or by proxy; [the names of the parties were set forth], being holders of 321 shares, exclusive of 600 shares, pretended to be held by S. Travers, making an apparent total of 921 shares; whereas, in fact, S. Travers never owned or held a share in the Company, either on his own account or in trust for others. That the following entry was made in some book of the Company of the proceedings of such meeting: "Resolved that the twelve following gentlemen be elected directors." [The names were stated.] That the persons who attended personally, or by proxy, and voted at such meeting, did not hold in the whole more than 321 shares. That, previous to such meeting, the following memorandum had been signed by the several parties thereto. [The memorandum of the 4th of July, 1837, was set forth (*b*).] That no general meeting, save the illegal or pretended meeting of the 12th of January, 1838, was held during 1838, but some of the persons named as directors assumed to act as such. That, at an illegal or pretended meeting of six of the pretended directors, held on the 24th of May, 1839, it was resolved, "That the standing orders be suspended; that every director and scripholder be requested to register the shares he holds in this Company within the following week." [The bill then stated the special general meeting of the 27th of June, 1839, *ante*, 343]. That, pursuant to such

(*a*) Ante, pp. 336 to 341. (*b*) Ante, p. 342.

resolution, a nominal and fraudulent transfer of the additional shares of 1000 each, so fraudulently subscribed for in the parliamentary deed, was made into the name of the secretary, in trust for the Company. That, in the books of the Company, the shares *bonâ fide* subscribed for are numbered 1 to 605. That, on the 22nd of July, 1839, another illegal or pretended meeting of the pretended directors was held, [*ante*, p. 344]. That, on the 2nd of August, 1839, the plaintiff transferred his shares in the Company to A. Molony, and a memorial of such transfer was duly made in the books of the Company, and the entry of such memorial was indorsed on the deed of transfer, and an indorsement of such transfer made on the back of the certificate of each share, and signed by the secretary, and by him delivered to A. Molony, whereby the plaintiff ceased to be a member of the Company, and thenceforth was not liable to pay the calls. That, on the 27th of September, 1839, another illegal or pretended meeting of the Company was held, [*ante*, p. 345]. That, at no one of the pretended special meetings of the Company did ten or more proprietors, holding or *bonâ fide* owning 1000 shares in the Company, ever attend or vote by proxy; and there never have been, since the passing of the act, any legally constituted directors of the Company; and all the beforementioned meetings and resolutions, and all entries thereof, are unauthorized by the act of Parliament. That, in consequence of no more than 615 shares having been *bonâ fide* subscribed for, which, if paid in full, would only raise a capital of 30,750*l.*, it became manifest that it was impossible to carry on the undertaking; and, under such circumstances, the parties who had *bonâ fide* engaged therein, were only liable to the extent of a deposit of 1*l.* per share, and no call could be made upon the subscribers. That long before the call of 5*l.* per share was made, [*ante*, 344], it had become apparent that the undertaking was a bubble, and such call, even if legally made, was a gross fraud on the subscribers. [The

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bill then stated an action commenced against the plaintiff, for compelling payment of the call of 5*l.* per share on the amount of his shares, and the pleas pleaded to the action.] That, in consequence of the special provisions in the act, the plaintiff will be unable at the trial of the action to give such evidence as will support his pleas. The bill prayed, that the defendants may be perpetually restrained from further proceeding in the action, and from commencing or prosecuting any other action or proceedings in respect of the matters aforesaid; and that all declarations which may be necessary to give effect to the relief to which the plaintiff is entitled in this suit may be made; and that all orders, directions and accounts may be made and decreed, as are necessary to give effect to such declarations; and that, in the mean time, the defendants may be restrained from further proceeding in the said action, and from commencing or prosecuting any other action or proceeding at law against the plaintiff in respect of the matters aforesaid, and for further relief.

The defendants demurred to the bill for want of equity. They also demurred, for that A. Molony was not made a party to the bill.

Mr. *Jacob* and Mr. *J. Russell* for the demurrer.

Mr. *Wakefield* and Mr. *Lovat* for the Bill.

They cited *Agar* v. *Regent's Canal Company* (*a*), *Mayor &c. of King's Lynn* v. *Pemberton* (*b*), *Green* v. *Barrett* (*c*), *Colt* v. *Woollaston* (*d*); and on the question, whether the act obtained by the Company was a public or private act, *Brett* v. *Beales* (*e*).

Feb. 15*th*. VICE-CHANCELLOR.—This bill represents this sort of

(*a*) 26th January, 1814, Reg. Lib. A. 1813, fol. 476; per Lord *Eldon*, 1 Swanst. 250. Not reported on the principal question.

(*b*) 1 Swanst. 244.

(*c*) 1 Sim. 45; *S. C.* 5 Law J. Rep. Chanc. 6.

(*d*) 2 P. Wms. 154.

(*e*) 1 Mo. & Mal. 420.

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case, that when this act of Parliament was in progress through the House of Commons, only a small number of shares was subscribed for. It appears that some standing rule in the House of Lords required that there should be a much larger number of shares subscribed for; and, in fact, that the requisite number of shares was subscribed for by reason of the additional subscriptions of the ten persons whose names appear in this bill, whose subscriptions altogether amounted to 9500 shares. That the House of Lords was satisfied, and the bill actually passed on the 15th of July, 1837. Now, it is for the House of Lords to determine what is the subscription for shares which will satisfy them; and I must suppose that the House of Lords were duly satisfied, that the subscription which had taken place was a subscription which ought to satisfy them; and then the only question is, whether, on this bill, there is enough stated to shew that there actually was a fraud practised on the legislature so gross that a court of equity should interfere. Now, it does not appear on the face of the bill, that the memorandum, which was dated the 4th of July, 1837, was signed at the particular time when the parties subscribed. What is stated is this: that previously to the holding of the said meeting,—then it mentions eight of the persons who signed the memorandum, and then it says,—that a similar memorandum had also been previously signed; so that it is quite clear that there was not a simultaneous signing by the ten, and that the thing could not have been done at one time. Now, then, if it was not signed at the time, of course it must have been signed after;—there is no pretence to suppose that it was signed before. And then, if the House of Lords was satisfied that the subscription was sufficient, within the view and construction of their own orders, can it be said that that subscription could be of no avail, because at some subsequent time the persons who had entered into that very large subscription took some

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steps, by means of which, more or less, they might be saved from the necessity of advancing, out of their own pockets, the whole amount of their subscriptions? As soon as the House of Lords was satisfied, and had passed the bill, did they not leave the persons who had subscribed the 9500*l.* at liberty to deal with their shares in the same manner as any previous subscriber for a less quantity of shares was left at liberty to deal with his shares? and therefore it really appears to me, that it would be a most presumptuous thing for this Court, on such circumstances as are represented on this bill, to say that, *ab origine*, the signatures were altogether false and fraudulent, and that the House of Lords allowed themselves to be entrapped into the measure of passing the bill by so simple a circumstance as a compliance with their own orders. I do not think I am at liberty to say that. Then it appears on the face of the bill, that some steps were taken for the purpose of disposing of shares, and that the shares have not been disposed of. What then?—those persons, whose subscriptions the House of Lords thought authorized them to sanction the passing of the bill, remain liable now to the same extent as ever they were. Let me put this case,—that shortly after the bill had passed, these ten persons had, by some accident, become bankrupts, could it have been said, that, because they were bankrupts, therefore the whole thing was to be treated as a nullity? The question is, whether the House of Lords had not good reason at the time to be satisfied with what was done; and I must say, that it does not appear to me there is anything on the face of the bill which goes to shew that such a subscription as these ten persons made is to be considered as a fraud and a nullity. If any construction is to be put, such as the framers of the bill would have the Court put, it would rather be this, that the subscription was good, and the means taken to afford a subterfuge from the effect of the subscription would be

void;—that I can understand. If (which I do not admit) the true effect of the memorandum of the 4th of July, 1837, was to enable the parties who had subscribed to escape from the subscription, I think this Court, as well as any other Court, would say, that the first act was good, and the second void, and that therefore these parties remain originally bound. If that be so, those meetings which *de facto* took place were not pretended meetings; they were the actual congress of the parties who are named; and if the doctrine be true, that these ten subscribers were all legally bound to make good their subscriptions, I should hold that, notwithstanding any secret reservation in their own minds, whereby they would if they could get rid of the obligation imposed on them by the subscription, that they were parties properly authorized to attend at the meetings which are detailed in the bill, so as to constitute ten persons or more having collectively 1000 shares. If that be so, it appears to me that the whole bill fails, because it is nothing to say, that it became apparent that the undertaking had failed and become impossible. There is no one fact alleged to shew that it had become impossible, any further than as it may be represented that there is a difficulty in raising the money; but I do not see any difficulty as to that, except what the plaintiff has himself created, because he is sued at law, and does not choose to pay, and then files a bill to evade the payment,—which is, of course, to a certain extent creating a difficulty. It does not follow that, because the time has elapsed within which this Company was bound to purchase the tenements which belonged to the Surrey Canal Company, that therefore the plan has failed, because, in the first place, it is not averred that the purchase of those tenements is absolutely necessary for the commencement of the Collier Docks; and it is not averred that there has not been actually some purchase made, or at least a binding contract made; nothing of the sort is

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to be found, but there only is an inference drawn from the facts, which are all raised on the supposition that the original subscription of these ten persons was bad, and that therefore the project cannot go on at all. Whereas it does appear to me, on what is stated in the bill, that those ten persons who subscribed are now by law liable to pay up the whole of their subscriptions; and they, as far as it appears to me, might be compellable by law, or in this Court, by a bill, to pay; and it would be no answer to any bill filed in this Court to compel payment to say, they intended a fraud to be committed:—it would rather make the matter worse. I think, therefore, that so far as the general object of the bill is concerned, it is quite plain that it cannot be supported.

Then with respect to the particular circumstances relating to the meeting: in the first place, supposing a meeting of the directors would be good, it appears to me, that is no answer to the equity (considering this part of the case separately) to say, that the meetings were not good, and that the calls were not proper; that, I apprehend, is a question for a court of law to determine; and it never has been the rule of this Court, that an action is to be restrained by a court of equity, merely because the plaintiff at law cannot make out his case,—that certainly is not the rule of this Court. I think that on the proper construction of those clauses of the act which regulate actions, that, *primâ facie*, there is enough to support the action; and, moreover, the clauses are such that, if in point of fact the call was not properly made, it rather seems that the defendant at law would be at liberty to shew, if he can, that it was not properly made; but in truth I am not sitting here to determine how far or not the action can be supported; the question is, whether there is any equity to support the bill, and I am of opinion that there is none. A question has been made with respect to Mr. Molony. I rather think that the

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true construction of the act of Parliament is, that if a person holding a share has a call made upon him, and, prior to the time of payment appointed by the call, he transfers his claim, in that case the directors would have the power to declare that transferred share forfeited; it rather seems to me to be so, but it is not necessary to determine that, because it is a question which will properly be determined at the hearing, when I have the proper parties; that will be a reason also for making Mr. Molony a party. I think on both grounds the demurrer ought to be allowed.

I do not think that I ought to allow the bill to be amended for the purpose of introducing a new case; I give credit to the counsel who prepared this bill, that he has *bonâ fide* stated the plaintiff's case; and, supposing that to be so, it appears to me to be as well stated as such a case can possibly be; and I am not aware of any circumstances having been suggested to support this case which have been omitted. I allow the demurrer with costs.

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March 11*th*, 12*th*.

Certain persons previously to soliciting an act of incorporation for forming a railway, executed a subscribers' deed and a parliamentary contract, and they received certain scrip certificates as evidence of their subscriptions, and upon which a certain amount had been paid.

The act of incorporation passed, providing for the registering of shares, empowering the Company to make calls, subjecting defaulters in payment to actions for debt, and declaring that their shares should be forfeited, and providing a form for the legal transfer and memorial of shares.

W. R. JACKSON *v.* J. COCKER.

THE bill stated an act of Parliament of the 1st Vict. c. cxxi. (*a*), for making a railway from Bolton-le-Moors to Preston, whereby (among other things) it was enacted, (sec. 1), that the parties therein named, their successors, executors, administrators and assigns, should be a body corporate by the name and style of the "Bolton and Preston Railway Company:" sec. 136, that it should be lawful for the Company to raise amongst themselves, for the purposes of the act, a sum not exceeding £380,000, to be divided into 7,600 shares of £50 each, and that such shares should be numbered in arithmetical progression; and every share should be distinguished by the number to be applied to the same, and should be and they were thereby vested in the several parties taking the same, and their several and respective successors, executors, administrators and assigns to their proper use and benefit: sec. 137, that all shares, and proportions of and in the undertaking should to all intents and purposes be deemed personal estate, and be transmissible as such: sec. 138, that the Company should, and they were thereby required, at their first or some subsequent general meeting, and afterwards as occasion might require, to cause the names and additions of the several persons who should then or thereafter become entitled to shares in the undertaking, and the number of

The plaintiff, a party to the subscribers' and parliamentary deeds, previously to the passing of the act, sold his scrip certificates; and having been, subsequently to the act passing, required to pay calls on his shares, filed a bill, praying that the purchaser might be declared to have taken an equitable assignment of those shares, and might indemnify the plaintiff from all past and future liabilities from the time of the sale.

Held, that the defendant, the purchaser, not having signed the subscribers' or parliamentary deeds, was in no way liable to the Company. That there being no special contract between the parties, binding the purchaser to accept a legal transfer of the shares, or to indemnify the plaintiff from his liabilities to the Company, a court of equity would not raise an implied contract for those purposes, and that the bill must be dismissed with costs.

Quære?—Whether a special contract for the above purpose could have been enforced, or whether the same is not illegal and void? (*Josephs* v. *Pebrer*, 3 B. & Cres. 639).

(*a*) This act received the Royal Assent, 15th July, 1837.

shares of which they were respectively possessed, and the amount of the subscription paid thereon, and also the proper number by which any share should be distinguished, to be fairly and distinctly entered in a book to be kept by their secretary, and, after such entry made, to affix their common seal thereto; and that the Company should, from time to time, cause a certificate or ticket, with the common seal affixed thereto, to be delivered to every proprietor, on demand, specifying the number of the share or shares to which such proprietor was entitled; and that such certificate should be admitted in all courts as *primâ facie* evidence of the title of such proprietor, but the want of such certificate should not prevent such proprietor from selling or disposing of such share: sec. 140, that where the right of property in any share of the undertaking should pass from the original proprietor by any other legal means than by a transfer or conveyance thereof, duly made and executed as in the act provided, it should be lawful for the Company, after such proceedings and such notice, as in the act mentioned, to the person, claiming to be the then proprietor of such share, to pay calls, to declare, in manner therein mentioned, such share to be forfeited, and the same should be thereupon forfeited, and should be sold or disposed of in such manner as in the act mentioned: sec. 141, that the several persons who had or should thereafter subscribe to the undertaking, should, and they were required, to pay the sums subscribed for by them respectively, in such proportions as should, from time to time, be called for by the directors, and enabling the Company to recover the amount called for by an action of debt in any of her Majesty's courts of record, or by bill, suit, or information; and further authorizing the directors to declare the shares of proprietors, so refusing or neglecting to pay calls, to be forfeited: sec. 153, that it should be lawful for proprietors of shares to sell, dispose of, and transfer the same, subject to the rules and conditions

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in the act provided; the transfer of such shares to be in writing, duly stamped, and the deed of transfer, being executed by the seller and purchaser, to be produced and delivered to, and kept by, the Company or their secretary, who should enter into a book a note or memorial of such transfer, and indorse a memorandum of such entry on such deed of transfer; and the Company, or their secretary, are, by the act required, to make such entry or memorial accordingly, and, on demand, to make an indorsement of such transfer, on the back of the certificate of such share, and to deliver the same to the purchaser, such indorsement to be considered, in every respect, the same as a new certificate: sec. 155, that no proprietor should sell or transfer any share, unless all calls made thereon should have been previously paid. That the act should be deemed a public act.

That the capital mentioned in the act being duly subscribed, the act was put into operation, and certificates or tickets for shares duly issued, being of the nominal value of £50.

That the plaintiff became possessed of forty shares, and duly paid the purchase-money thereon, and became possessed of forty certificates, numbered [as mentioned in the bill]. That the defendant became desirous of purchasing from the plaintiff the said forty shares. That in *August*, 1836 (*a*), the defendant contracted and agreed to purchase from the plaintiff, the shares or certificates of which the plaintiff was so possessed or entitled to; and he paid to the plaintiff £120, the purchase-money for the same, and thereupon the certificates or tickets, of which the plaintiff

(*a*) It is importan to observe this date, as it thereby appears that the sale of the scrip certificates was prior to the act receiving the royal assent:—15th July, 1837. Without noticing these dates, it would seem, from the statement in the bill, that the *whole* of the transaction in question was *subsequent* to, and consequent on, the act. The entire case, and the judgment, is founded on the ground, that the asserted sale of the certificates was *prior* to the passing of the act.

was then possessed as aforesaid, were delivered by him to, and were accepted by the defendant; and the plaintiff being advised, that, in order to his complete indemnity in respect of future calls, it was requisite that a proper legal transfer of the shares should be made and executed, hath requested the defendant to accept a proper and legal transfer thereof, which he hath refused and refuses to do.

The bill charged, that, since the shares or certificates were so sold, two calls had been made: one for £3, and the other for £4 per share, upon proprietors of shares. And such calls were respectively over-due and payable, amounting, on such forty shares, to the sum of £120 for the first, and £160 for the second call. That the defendant ought to be decreed to indemnify the plaintiff, and to pay such amount, and to indemnify the plaintiff from all costs and expenses in relation thereto; the plaintiff having been threatened with proceedings by the directors for the non-payment of the same. That, in case the defendant should neglect or refuse to do so within a reasonable time, the shares or certificates ought to be sold or mortgaged under the direction of the Court, and, in case of deficiency to answer the payments aforesaid, the defendant ought to answer and make good the same; and that the plaintiff hath no means of proceeding against the defendant at common law, for recovery of his just and equitable demands. After the usual charge as to books and papers, the bill prayed, That the agreement for the purchase, by the defendant, of the forty shares or certificates from the plaintiff, may be decreed to be specifically performed and carried into execution by and under the direction of the Court, and that all necessary and proper directions may be given for such purposes, and that the defendant may be decreed and declared to be liable and bound in equity to indemnify the plaintiff against the calls which have been made, or any other calls which shall be made upon, or in respect of, the shares subsequent to such purchase; and

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from all claims, actions, suits, or other proceedings in respect thereof, and all costs and expenses in relation thereto, together with the costs of this suit; and that the defendant may be decreed to indemnify the plaintiff accordingly. And that it may be referred to one of the Masters, &c., to settle and approve of a proper indemnity to the plaintiff accordingly; and that, if necessary, the shares and certificates may be sold or mortgaged, or otherwise disposed of, by and under the direction of this Court, and that the money to arise therefrom may be applied in or towards such indemnity of the plaintiff as aforesaid. And that the defendant may be decreed to do and join in all acts necessary for that purpose; and, in case the money to arise by such sale or mortgage, or other disposition of the shares, shall be insufficient for such indemnity, and also for payment of plaintiff's costs and expenses, then, that the defendant may be ordered and decreed to pay and make good such deficiency, and that, if necessary, the defendant may be decreed to procure, or join in and accept, a proper transfer to him of the shares. And that the defendant may be decreed to pay all the costs of this suit, and for further relief.

The answer of the defendant *stated*,—That certificates of shares in the said Company, as well as in other Railway Companies, are commonly bought and sold, and the holders of such certificates and tickets, for the most part, have no legal transfer made to them, but the transaction is completed by the payment of the money and receiving the certificates; and such sales and purchases have, for the most part, no reference to any assignment or transfer in writing, or any transfer to be entered in the books of the Company. That he was desirous of purchasing forty certificates of shares in the Company, as a speculation, never intending or supposing it to be necessary to have any legal transfer of the shares, or to be entered as an owner in the books of the Company, but merely to become the

holder for the chance of selling them again at an increased price.

Believed, that the plaintiff was not the proprietor of the forty shares, but, on the contrary, as he has been informed, and according to the tenor of the certificates, other persons were the proprietors thereof [the names of five parties were stated as being the actual proprietors]. That there was no indorsement on any of the certificates of any transfer of any of the shares to which the certificates related.

Believed, that no deed of transfer of any of the shares has been executed or entered in the books of the Company; and that, excepting the possession of the certificates, the plaintiff had not, at the time of the sale, or of filing the bill, any title or interest in any of the forty shares.

Stated, That the plaintiff having offered the certificates for sale, the defendant purchased the same for £120, intending to retain the same only until he could make a profit of the sale of them, and without any idea of having a transfer of them executed to him. That the expense of a transfer, including stamp duty, would have made it imprudent to engage in the speculation; and the plaintiff, on the sale and purchase, made no reference to anything except the certificates, the possession of which was all that the defendant intended to buy, and all that the plaintiff intended to sell.

Believed, that, with respect to, at least, thirty-five of such shares, the plaintiff was not, at the time of the sale, nor at any time since has he been, in a condition to make a valid, legal transfer, nor did he appear as the owner thereof in the books of the Company. That the defendant paid to the plaintiff £120 and received the certificates, and thereby, as between him and the plaintiff, the transaction was completed, and neither of them had, or supposed they had, any further rights or claims against the other in respect of the transaction.

Admitted, that the certificates still remain in his, the defendant's possession.

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Both parties entered into evidence.

Mr. *Tinney* and Mr. *Walker*, for the plaintiff.

Mr. *Kindersley*, and Mr. *Russell*, for the defendant, cited *Josephs* v. *Pebrer* (*a*).

The arguments of counsel are fully comprehended in the judgment.

MASTER OF THE ROLLS.—This has been very justly said to be a bill of the first impression; for I, certainly, recollect no bill, in the least degree, resembling it. The case is brought forward in great confusion, and in a very imperfect form; but the defendant has, properly enough, waived the benefit of any confusion, and has agreed to have this considered as a case founded on the facts which are now admitted; and, therefore, the case is relieved from a difficulty which might have arisen in that respect.

The bill is filed for the specific performance of an alleged agreement for the purchase of certain shares in a Railway Company. It seems that in July, 1836, certain persons proposed to apply to Parliament for an act to authorize the construction of a railway from Bolton to Preston in Lancashire; for that purpose, entered into subscriptions, and, I may assume, that they contemplated raising a capital to defray the expenses of applying for, and promoting the progress of, and completing the act of Parliament, if they could obtain an act, and for executing the necessary works, if the act should be obtained. Two things were important for them to do: one was, to come to such an agreement amongst themselves, as should provide for a due contribution towards the expenses, in all events, whether the project should succeed or not; another was, that they should comply with the regulations which are adopted by Parliament on applications for bills of

(*a*) 3 B. & C. 639; 5 Dow. & Ryl. 542; 1 Carr. & Pay. 507; see *Latham* v. *Barber*, 6 T. R. 67.

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this nature. The standing orders of the House of Commons require that a contract, which is called a subscription contract, should be signed in a particular manner; and, then, as is known, the effect of acts of Parliament, of this nature, when passed, is to incorporate the persons who have subscribed, or shall subscribe, towards the undertaking, and their several and respective successors, executors, administrators and assigns, to enable the subscribers to raise money amongst themselves, to a limited amount, and to divide that amount into shares, which are to be transferable shares. Subscription contracts must be made to a certain amount, and in a certain manner, before the bill can be introduced, but the transferable shares of the capital, the proprietorship, if it can be so called, are the results of the act, and of the powers and privileges which are given by the act. Now, in this, as in other cases of a like kind, the persons who subscribe for the purpose of obtaining the act, and the fruits of the act, very naturally proportion their subscriptions to the amount of the shares which they desire either to possess, or, to have the means of dealing with, and to their hopes or expectations of obtaining shares, or their right to deal with shares, and these subscriptions have been commonly, but very erroneously, called "shares;" whereas, the act, when passed, constitutes "shares" and makes them transferable; the subscribers have divided their subscriptions into shares, and have taken upon themselves to grant certificates as evidence of the right to shares, and these certificates have been often considered as evidence of the shares, to distinguish them from the real title to shares; they have been called, and properly called, in this case, scrip certificates. Not only have such certificates been granted, but they have been bought and sold, and, as is too well known, they have been made the means of gambling, of bribery, and of frauds of the most extensive character. Whether or not they are legal, in any event, is a question which, perhaps, might have de-

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served greater consideration than it has received to-day. I am not disposed to treat lightly the suggestion made by Lord Tenterden (*a*); certainly, nothing has to-day occurred which makes me think that that suggestion is not deserving of the most serious consideration. It does not, however, appear to me to be necessary to decide that question at present, and, considering, that, in this case, there is no imputation of fraud, or of malpractice of any kind, I have now to look at the nature of the transaction, in order to see whether I can discover, from the facts, the foundation of any such right as is claimed by the bill.

That which is called the subscribers' contract seems to have been entered into in the month of July. I do not think it appears distinctly in evidence what was the date, but it is stated to have been the 13th of July; at any rate, it is admitted to be before the date of one of the certificates which have been produced in evidence. Certain persons having subscribed, and having made themselves liable to one another, for the expenses which were to be incurred, and having done such acts as might be necessary towards inducing Parliament to receive the bill; having, as I assume, done those things (which I also assume were for the benefit of all parties); they further do, what has been done on many other occasions, they call their subscriptions "shares;" and to each subscriber, according, as I presume, to the number of his shares, was delivered a certain certificate. The certificate which has been produced, one of the forty the subject of this suit, is thus expressed,—"Bolton and Preston Railway-Certificate.—£50 share. No. 1510. The holder of this certificate, having signed the subscribers' agreement, and executed the parliamentary contract, is the proprietor of the above share in the undertaking. Signed, B. Dobson, B. Hicks, Members of the Committee. 13th July, 1836." He is the proprietor of

(*a*) In *Josephs* v. *Pebrer*.

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the above "*share*" in this undertaking;—a *share* which could not be so constituted, a *share* which could not exist until after the act of Parliament had passed, incorporating this Company, and giving them the means of having a joint stock divisable into transferable shares! He is "the proprietor of the above share!" When is he the proprietor? "The holder of this certificate, having signed the subscribers' agreement, and executed the parliamentary contract, is the proprietor." Now, the first holder of this agreement—I am assuming the fact, for it is not proved,—I am assuming that the first holder of this agreement is a person who had signed the subscribers' agreement, and executed the parliamentary contract; meaning by the parliamentary contract, (as I am also assuming, for every thing is left here in a dubious state), that contract which, in the standing orders of the House of Commons, is called the subscribers' contract, without the signature of which, in a particular form, the bill will not be received. Well, then, having obtained this certificate, he is not the proprietor of a *share*, but a person who, if the act passes, will *be entitled to become the proprietor of a share*. He, having this, passes it into the hands of another person; he does it for a valuable consideration. That other person signs no special agreement, does not do any thing whereby he binds himself, in any way, to indemnify the party, from whom he received it, from his liabilities in respect of his signature to the subscribers' contract, or his execution of the parliamentary contract, nor does he sign any agreement by which he engages himself to become a proprietor, but he pays a certain sum of money, (in this case it is said to be £3 per share), and, having paid that sum, he receives this certificate. Now, then, I have this certificate in the hands of a person who has done nothing whatever but pay a sum of money to another; he has not signed the subscribers' agreement; he has not executed the parliamentary contract; he is not, either at the present time or prospectively,

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the proprietor of the above share in this undertaking, because he is not a person who has done those things which can alone constitute a proprietor.

The whole argument, as I collect it, is really this:—That, having possessed himself of this certificate, he must be understood, by law, to have taken with it an obligation to do all those things by which he may constitute himself a proprietor; and, having constituted himself a proprietor, by which he shall be bound to indemnify the party, from whom he received the certificate, from all further liabilities, and also from past liabilities.

Now, then, I come to the real question: Whether, upon a transaction of this nature, the Court will raise such a special contract as I have just mentioned? I have listened in vain for any satisfactory reason to convince me that there is such an implied contract in this case. What the plaintiff does is this: he gets a certificate, by which he is told that if he does certain things he will be a proprietor. That is the only rational construction which I can give to it. It is expressed with great ambiguity;—I should rather expect with studied ambiguity:—telling him, in effect, that, if he signs the parliamentary contract, and executes the subscribers' agreement, and provided the act of Parliament passes, then, under those circumstances, he will become a proprietor. All those things must concur before he can become a proprietor.

Now, one argument which was used upon this is certainly rather extraordinary. It is said, that brokers, persons who deal in these certificates or securities, found that they could not procure so good a sale if they clearly expressed that which is alleged to have been intended by this vendor; therefore, this vendor, meaning that the law should raise such an agreement, as it is contended it does, does not think fit to express that intention clearly, because, if he should express it the purchaser would be on his guard, and would not enter into the agreement; and,

therefore, the broker, who, in this case, is acting as the agent of the vendor, is to express the thing ambiguously, and afterwards the vendor is to take advantage of the ambiguity.

Counsel for the Plaintiff.—The certificates were not sold by the broker.

MASTER OF THE ROLLS.—No; but that is the argument with respect to this transaction. The vendor is to take advantage of the ambiguity, and to fix on the purchaser an obligation which the contract itself, if it can be called a contract, did not import; and which the purchaser did not intend. These were not sold by a broker. They were sold by the agency of Mr. Maudesley; the parties call it a *purchase of shares*, which it certainly is not, and could not, by either party, be so understood; it was a purchase of these *certificates*.

The question, then, is,—Is there a contract for indemnity? Is there a contract, at all events, to become the proprietor of shares? I cannot find it expressed; I cannot find it raised by implication of law. There is no evidence of it. In my opinion, there is not such an agreement as the plaintiff seeks to have specifically performed, therefore, I must dismiss this bill with costs.

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Between J. MANSER - - - - Plaintiff,

and

THE NORTHERN and EASTERN COUNTIES RAILWAY COMPANY and M. A. BORTHWICK - Defendants.

April 30*th*.
May 1*st*.
8*th*.

A Railway Company, in the progress of their works, proposed to cross a mill-stream by a bridge to be supported in the centre of the mill-stream by two piles placed sixteen feet apart. The bridge was to be six feet in height above the level of the water. The plaintiff, the owner of the mill, asserted, that that height was insufficient to allow barges to pass under, and also that placing piles in the stream would impede the flow of the water, and thereby stop the working of the mill. The Company adduced affidavits of engineers to shew that the level of the railway, and the nature of the ground upon which the embankments were founded, prevented them from making the bridge of a greater height; and they also shewed, that over a public navigable river, which was connected with the mill-stream, there were some bridges only six feet high; and, moreover, that, at the time of the passing of their act, there was over this mill-stream a bridge of that height, though such bridge had since been pulled down by the plaintiff, and re-erected of a greater height. That the flow of water would be in no way impeded by the piles.

The plaintiff adduced affidavits of engineers to shew, that, although some of the bridges over the navigable river were of the height of six feet only, yet that the water under them could be lowered by waste gates. That, to obtain a perfect level on the line of the railway, the embankments, and, consequently, the bridge over the mill-stream, ought to be raised two feet.

Held, by the Vice-Chancellor, that the act authorising the Company to conduct their works, doing as little damage as possible, the plaintiff, under the circumstances stated, was not entitled to require the Company to build the bridge at the height of more than six feet.

Held, by the Lord Chancellor, that nothing but necessity could justify the Company in carrying on their works in such a manner, or on such a level, as would cause serious damage to the owner of the land.

In a case where the affidavits on engineering points are conflicting, the Court will seek for the professional assistance of some impartial engineer to form a decision upon them.

THE bill stated, that the plaintiff is seised of certain freehold estates, and other hereditaments, in the hamlet of Hoddesden, and, amongst them, an ancient mill, worked by means of a spring, which rises upon his hereditaments, and, after running through the same, flows into the Broxbourne mill-stream. [The bill then stated the act of the 6 & 7 Will. 4, incorporating the Northern and Eastern Counties Railway Company; and the 31st section conferring on them the usual general powers for making and maintaining the railway.]

That the plaintiff, about the end of October, 1840, was informed that the Company proposed to build a bridge over the Hoddesden mill-stream, near the plaintiff's mill, and crossing his mill-tail about 150 yards only from the mill; and it appeared, by a minute in the Company's books, which was shewn to the plaintiff, that it was pro-

posed to make the bridge of the height of six feet only, and to contract the width of the stream.

That, on the 2nd of November, 1840, a letter was, by the desire of the plaintiff, sent by his solicitor to the Company, informing them, that the plaintiff would require the bridge to be made eight feet clear in height from the water to the soffit, as it would otherwise prove an obstruction to barges passing and repassing to and from his mill; and moreover requiring, that the stream should not in any way be narrowed by piles being placed in the water.

That no answer was returned to such letter, whereupon a second letter was sent, which also received no answer. That the bridge was not proceeded with until the 8th of April, 1841; upon which occasion, the plaintiff, being informed that the erection of the bridge was about to be resumed, applied to Mr. Borthwick, the resident engineer of the Company, for the purpose of ascertaining the dimensions of the bridge, and learning whether any alterations had been made in the original plan; but Mr. Borthwick declined to give any information whatever on the subject.

That the plaintiff, as owner of the Hoddesden mill, hath certain rights and privileges in the Broxbourne mill-stream; to wit, to have the stream kept by the owners or occupiers of the last-mentioned mill at a certain level, and the channel cleansed, and any obstruction impeding the free passage of water from his mill, through the Broxbourne mill-stream into the river Lea, removed.

That the plaintiff hath a right of navigation upon his mill-stream, of which he is in the continual exercise, from the river Lea, through a branch of water leading from the river into his mill-stream.

That if either of the mill-streams should be contracted in width, even in a very slight degree, or if any obstruction whatever be occasioned thereto by the manner of making the intended bridge, it will have the effect of penning

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the tail-water back upon the mill-wheel, and will impede or stop the working of the mill.

That the plaintiff is apprehensive that the Company in building the bridge, intend to drive piles into the bed of the stream, and to contract the stream.

That if the Company shall build a bridge of the height of six feet only, which it appears to be their intention to do, the plaintiff will be impeded and injured in the right of navigation of his mill-stream.

The bill charged as evidence thereof, that the plaintiff had a bridge over the mill-stream, with the soffit only six feet high from the level of the water, and found it necessary to remove, and did, in fact, remove such bridge, and erect a new bridge of the height of seven feet seven inches.

The bill also charged, that the defendant Borthwick is able to discover the several facts aforesaid, and prayed—

That the Company, their servants, workmen, and agents may be restrained from proceeding to build the intended bridge across the Hoddesden mill-stream, with the soffit thereof less than seven feet seven inches in height, above the level of the water; and from driving any piles into, or laying any stone or other materials in the bed of the stream for the purpose of building or constructing any such bridge: or in any manner obstructing, narrowing, or impeding the stream; and from doing any other matter or thing, whereby the channel thereof may be contracted, or the present free passage of water through the same, in any degree impeded, or the plaintiff interrupted or obstructed in the enjoyment of his rights and privileges of navigating his barges and boats upon the stream; and for general relief.

The plaintiff, on an affidavit of the above facts, obtained an *ex parte* injunction in the terms of the prayer of the bill.

The Company gave notice of a motion to dissolve the injunction, on the grounds set forth in an affidavit to the following effect.

Mr. Bidder, the principal engineer of the Company, de-

posed, that for many years, and long before the plaintiff was possessed of the mill, and, as deponent believes, long before the memory of any person now living, there was, and still is, a public footpath across land on the opposite side of the mill, which is continued past the mill, into Hoddesden, by means of a bridge, and which is the bridge referred to in the plaintiff's bill and affidavit.

That the bridge was of the height of five feet, or thereabouts, above the usual level of the water, and it was of that height when the Railway Act passed, and when the plans and specifications for the line of railway were made, and the contract for making the works at the place in question entered into. That at the point of the stream where the Company propose to erect their bridge, the width of the stream is 33 feet. That the width of the waterway under the proposed bridge between the piles in the centre of the stream, will be about 16 feet, and of a much greater depth than the waterway under the public bridge, and such width is also greater than the locks on the river Lea; and a waterway of the width of eight feet, or thereabouts, will be left on each side of such piles, so as not to interfere with the free current of the stream.

That in deponent's opinion no perceptible difference will be occasioned in the flow of the water, or any impediment to the working of the mill be occasioned.

That negotiations had some time before the filing of this bill, taken place between the Company and the plaintiff, as to the height of the railway bridge, and the Company had positively refused to make it higher than six feet. That it was after this refusal was known to the plaintiff that he removed the public bridge, and erected a new one of the altered dimensions, mentioned in the bill.

That it would have occasioned a very serious inconvenience to the Company, and considerable additional expense, to have constructed the railway bridge of the height required by the plaintiff, inasmuch as it would have affected

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the line of the railway for a considerable distance, and the alterations would have been attended with great risk of danger, as it would have been necessary to have increased the embankments for the line on both sides of the stream, and, from the land being of a marshy, boggy description, such addition to the embankments might, and in his judgment probably would, have caused the embankments to sink.

The plaintiff filed affidavits in reply. Mr. Gregg, the surveyor of the river Lea navigation, deposed, that in case a bridge, not exceeding in height six feet, be erected over the mill-stream it will be impracticable to navigate barges under such bridge in case of floods or high water. That, notwithstanding there formerly were and still are over the river Lea navigation bridges which did and do not exceed six feet in height, still the deponent, in consequence of the obstruction and inconvenience experienced thereby, is raising the height of such bridges from time to time to between seven and eight feet; and moreover, as regards such bridges, there exists the power by means of the locks or waste gates of lowering the water under the bridges, should it be requisite.

Mr. Giles, an engineer, deposed, that, if the railway bridge be built upon piles driven into the bed of the stream, it will so contract the stream and the navigable channel of the river as to render it impracticable for barges to pass up the stream through such bridge without striking against the piles; thereby occasioning damage to them.

That it appears to deponent, that the surface of the railway, instead of being carried upon a level or gradual ascent, is actually on a descending plane from Broxbourne mill bridge to Hoddesden mill-stream, and that the railway might and ought to be carried on such a level as would afford the height required by the plaintiff.

The affidavits also contained contradictory statements to he affidavit of Mr. Bidder on the engineering and other points.

Mr. *K. Bruce*, Mr. *Jacob*, and Mr. *L. Wigram*, in support of the motion to dissolve the injunction.

The Company acting *bonâ fide* are the judges of the best mode of making the railway (*a*); this rule will turn the scale, in favour of the Company, between the conflicting opinions of Mr. Bidder and Mr. Giles, as to the ascent and height of the railway embankments, assuming those opinions to be entitled to equal weight. The Company are bound, in the performance of their works, to do as *little damage as possible* consistently with making the railway in the most beneficial way for the public advantage and safety; and, as regards the safety of the public, conclusive reasons are shewn, in the affidavit of the Company's engineer, why the embankments cannot be made of a greater height than as now designed. That the height of the bridge must be governed by the level of the railway is a proposition so simple as to admit of no contradiction.

Coats v. *The Clarence Railway Company* (*b*), which will be relied on by the plaintiff's counsel, is very distinguishable from this case; that was the case of an arch thrown across a mill-race, with a span of such dimensions as to contract the width of the mill-race; there was no dispute about the *height* of that arch, which, it is obvious, must be the distinguishing feature in bridges for carrying a road on a level across waters. A yard, more or less, in the width of a bridge can make no difference in the level, whereas a foot in height would disarrange the level of the railway, probably for several miles.

The plaintiff cannot create an equity for himself by having pulled down the old foot-bridge, and erected another of increased dimensions in its place.

(*a*) See *The London and Birmingham Railway Company* v. *The Grand Junction Canal Company*, ante, Vol. I., p. 238; *Priestly* v. *Manchester and Leeds Railway Company*, ante, 134.

(*b*) 1 Russ. & Myl. 181.

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Mr. *Wigram* and Mr. *Moore* in support of the *ex parte* order.

The building of the new bridge is only material in this sense, it shews the *bonâ fide* nature of the plaintiff's claim to have the railway bridge made of the increased height. The fact of inconvenience, from the height of the old bridge, is uncontradicted.

To argue from the fact of the height of the old bridge is absurd, it might equally well be attempted to defend the erection of a nuisance, by asserting that the party complaining had submitted for many years to a nuisance of a like nature, before causing it to be removed. As regards expense it is not contended, on behalf of the plaintiff, that the Company are to lavish many thousand pounds in complying with the wishes of one landowner; but it is submitted, that they are bound not to cause irreparable mischief, very distinguishable from damage, for the sake of saving themselves expense. The plaintiff's affidavits shew, that raising the bridge and embankment two feet will place the railway on an actual level, whereas it is now on a slope. To be consistent the argument, on the part of the Company, must affirm that the railway is formed on a perfect level. *Coats* v. *The Clarence Railway Company* (*a*) is conclusive in favour of the plaintiff; that case turned on the point whether expense to the Company was to prevail over convenience to the landowner: the question, it is true, regarded the width of a bridge, but the principle is equally applicable to height.

Mr. *K. Bruce* replied.

May 1st. VICE-CHANCELLOR.—By this act of Parliament it was contemplated that damage would be done. I do not, in the first instance, see that what the Company propose to

(*a*) 1 Russ. & Myl. 181.

do is a thing which by law they may not do. It is certainly not a thing which by law they may not do if they make their proposed works under the pressure of the necessity of making them in a given form, doing as little damage as possible. Now it does not appear to me, that, merely because it might be more advantageous to the plaintiff to have a bridge with a soffit of seven feet above the surface of the water, that therefore of necessity the bridge is to be in that form. I was much struck with a passage contained in Mr. Gregg's affidavit, as contrasted with one in Mr. Manser's affidavit. Mr. Manser states,—"that he has a right of navigation in the whole stream, of which he is in the continual exercise, to and from the river Lea, through a branch of water leading from the said mill-stream into the river, to and from the mill."—Therefore, as I understand it, the value of the navigation to him is this, that it enables him to have direct communication with the river, and Mr. *Wigram* has called my attention to the circumstance that the barges used by the plaintiff are barges of the same sort and size as those used on the river Lea.

That being the case, Mr. Gregg, who is the surveyor of the river Lea navigation, states this fact:—"That although there formerly were, and still are, over the river Lea navigation, certain bridges which did and *do* not exceed six feet in height; still, that he, as the manager of the navigation, in consequence of the obstruction and inconvenience experienced thereby, is raising the height of such bridges, from time to time." That is an admission, that, as the matter stands at present, some of the bridges over the river Lea, are not above the height of six feet, and as the value of the navigation of the mill-stream consists in its being connected with the navigation of the river Lea, it does not appear to me that the plaintiff could reasonably require that the bridge to be made over this little stream, should be higher than the bridges over the river itself, some of which are only six feet. I therefore think, that it is com-

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petent for the Company to traverse the mill-stream by a bridge which shall be six feet above the level of the water beneath, according to what the act of Parliament has expressly said.

Counsel for the plaintiff.—The plaintiff's affidavits state that barges can pass under the bridges over the river, by lowering the water by means of the locks.

VICE-CHANCELLOR.—I am quite aware of that, and that there is a provision for making a bridge over the river Lea, of the height of ten feet, but that has been forced upon the Company; and it does not follow, that because the Company have, in compliance with that particular provision, made a bridge of ten feet above the surface level of the river, that therefore they are bound to make bridges over other waters of that same height. It is clear that the legislature has left bridges over other waters to the operation of the 31st section. There is this further observation: if this bridge was to be made higher than six feet above the surface of the water, as I understand it, as a necessary consequence, the height of the embankments must be increased. I do not attend to the expression "four *or* five feet," because that is not a specific statement; but it is perfectly manifest that so far as the centre of the bridge is made higher than six feet above the centre of the water, to that extent the embankments must be raised, in order that the railway be upon a level; and it is stated by Mr. Bidder, that if this is to take place, "then the alteration will be attended with great danger, as it would be necessary to increase the embankments for the line on both sides of the stream; and from the land being of a boggy, marshy description, such addition to the embankments must, and in the judgment of this deponent, probably would, cause the embankments to sink;" and I understand the present embankments are made with a view to carry the road on

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the present level; it therefore appears to me, that there is a physical difficulty presented, to making the bridge of a greater height than six feet; and that the act of Parliament never meant that the railway should not be made, but that it should be made, *doing as little damage as possible.*

Mr. Bidder's affidavit is not contradicted, and I must take it to be true, that making the embankment higher, which would be the necessary consequence of making the bridge higher, would tend to make the embankments sink; in other words, make it impossible to have the railway conducted in its present line. It rather appears to me, that so far as the height of the bridge is concerned, a case has not been made out which would authorize me to continue the injunction.

Then the next question relates to the mode of making the bridge. It is insisted that it ought to be made so that the abutments of the bridge on both sides should rest on the land. Now I do not immediately accede to that, because it appears to me, that if the river is made of such a width, as shall, after making an allowance for the space of the surface of the water which will be occupied by the area of the piles, allow a clear passage of thirty-two feet, by means of a clear waterway of sixteen feet, between the piles in the stream, and a clear waterway of eight feet, between either pile and the land, that then there will be as ample and free a passage as now exists, and I do not think that the plaintiff is at liberty to require more. If, therefore, the Company will undertake to make the waterway of the width specified in Mr. Bidder's affidavit, the injunction ought to be dissolved.

I think I ought not to give the costs. It seems to me that there was quite enough of a primâ facie case to entitle the plaintiff to ask for the opinion of the Court, and I cannot dissolve the injunction without putting the Company under an undertaking as to the bridge.

With respect to the circumstance that Mr. Manser built

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a bridge last year, I do not think that much affects the case, because it only amounts to this, that he felt a necessity for making a bridge of a greater height than before existing, it only shews how he felt with regard to that bridge; but the height of that bridge is quite immaterial with regard to what are his rights under the 31st section of this act.

I dissolve the injunction, but without giving any costs; the Company undertaking to make the width of the waterway under the bridge, in the manner specified in Mr. Bidder's affidavit.

The plaintiff appealed.

Mr. *Wigram*, and Mr. *Moore*, for the appeal.

Mr. *Jacob*, Mr. *Bethell*, and Mr. *L. Wigram*, for the Company.

The LORD CHANCELLOR.—I cannot safely dispose of this case upon the evidence now before me, without examining the affidavits more minutely. I certainly feel, as I have in all these cases, that I myself am much less capable to make an order that would be perfectly just between the parties than might be obtained by calling in some professional assistance indifferent to both parties, who would state to me what the result of them is, on the exercise of that engineering science which I do not possess, even if certified as to the facts (*a*). But I have no doubt whatever upon the construction of the act. No question can exist upon that construction. The Company undoubtedly have powers to take land, if they think proper, within the limits prescribed by the act, and I will assume that they have a right to adopt any level which they please; but then they cannot do that capriciously; and having got into a certain

(*a*) See *Webb* v. *The Manchester and Leeds Railway Company*, ante, Vol. I., p. 576.

level, they cannot part with that level and come down on the plaintiff's stream of water, and destroy the interest in that stream of water, without some very cogent reason for so doing. The only way to try that, is to take a case; and I will take this case. Here they say they have left sufficient space, and have not so interfered with the water as to create a damage to the parties interested in the navigation of it; but if that be the construction of the act, they had a right to come down and destroy the navigation, or to do that which I called Mr. Jacob's attention to, to bring their bridge so close to the surface of the water, as entirely to impede the navigation. That could not be done, except in cases of extreme necessity; and the act has clearly and carefully, and also very intelligibly, laid down the rule that they are to follow. They may do what is necessary for the purpose of carrying through the works which the act authorizes them to carry on, but in doing that, they must do as little damage as may be. If they cannot carry on the works without doing certain damage, if it is land, they are bound to purchase it; if it is not land, but some interest which is affected by it, they are bound to compensate the party in money; but if the damage to be done is not a necessary consequence of the works they are to carry on, then, this Court being apprized of what is in progress, will interpose to prevent it; because, in that case, it is an excess of the power given by the act; the act only authorizing them to carry on their works, doing as little damage as may be. If they think proper to carry on the works, doing more damage than the necessity of the case requires, then the Court will interfere.

That being the construction which I have always put on these acts, and which I believe all other Judges have done, the question is, whether this case comes within that rule of construction? I find in this case, certainly, a very peculiar state of facts, because I find the railroad proceeding up to certain points on each side of the *locus in quo* on a

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certain level, and then the level is altered, and assumes a lower level, and is gradually lowered, until it reaches the particular point in question, which I understand to be the lowest point of the level on which the railroad runs, and from this particular point it rises to the level which it pursues in other places. I certainly have not been at all satisfied of the existence of the necessity that the Company should adopt that course. It has been attempted to be explained on the affidavits, and it may possibly be so; but it has not satisfied my mind that there is any necessity for that; nor have I been able to comprehend how it is that the bank upon which the railroad is to run may be safely carried to the height to which it has been carried, and cannot safely be carried a foot higher. It is so stated in the affidavits; and that raises a proposition so difficult to comprehend, considering the weight which these railroads are destined to carry, that I must confess I have great doubt whether I can act upon any such assumption. But, however, if I am compelled to do it, I must make up my mind upon the affidavits as they stand, unless the parties will concur in a proposition which I will throw out now, because I think it will tend to the benefit of both, and prevent the chance of my miscarrying, which I may do, if I am obliged to decide upon the affidavits as they now stand. We all know, without impeaching the intention of the persons who make affidavits upon a speculative opinion, that the mere circumstance of their being called upon to give an opinion in favour of one party, influences the judgment; or, (which perhaps is more likely) they are called upon to make affidavits, because it is ascertained beforehand that they entertain that opinion. Either the one or the other may account for various opinions given on mere matters of speculation, which makes it dangerous for the Court to act upon them, if there are other means of ascertaining the truth.

The points which I want to be informed upon, and upon

which I should like to have the affidavit of some eminent engineer, are, first of all, what height between the usual level of the water and the soffit of the bridge, is necessary to prevent damage to the plaintiff's right of navigation of the stream; and to state whether a bridge running on that height above the stream can be made; and to state the mode in which such a height can be obtained. That will dispose of the question of the height. Then comes the other question, which is, the impediment of the navigation, which depends upon two points: first, the space which is left for the navigation, which is sixteen feet in this case; and the other is, how far these piles being driven into the stream, are likely to impede the flow of the water, so as to throw the water upon the mill. I should propose, therefore, a similar question applicable to the second point: namely, what depth of waterway, and of the passage for barges, is necessary to prevent damage to the plaintiff's right of navigation, and then to state by what means that width, either of the waterway or of the passage for the barges, could be effected. In considering what is represented to me (for I believe it is not verified), at any rate, I have no positive evidence upon this subject, but that which the defendants represent to me as being either a thing done, or intended to be done, according to the plan they have produced. In the first place, I think it is difficult to conceive that that would not be injurious to the plaintiff's right of navigation. It is much more clear, that, if it be so, there can be no possible reason why the defendants should adopt that mode of crossing the stream; because there can be no difficulty in crossing the stream in a different manner, which would much less interfere with the waterway, and the passage of barges; but I would much rather have the opinion of some eminent engineer on the subject, than act upon my own deduction from the affidavits. If the two parties can agree upon some disinterested engineer of eminence, upon whose opinion I can rely, it will be the means, it is

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most likely, of effecting what is, or should be, the object of both parties.

Let the case be mentioned again.

(The case was afterwards compromised).

Between THE MIDLAND COUNTIES RAILWAY COMPANY - - - - - Plaintiffs,

and

CALDECOTT (an infant) - - - - Defendant.

June 25th. IN this case, a point precisely similar to that in *The Midland Counties Railway Company* v. *Wescomb* (ante, p. 211) was raised.

The VICE-CHANCELLOR said, he thought the decision in the above case right, and should adhere to it.

Mr. *J. Parker*, for the plaintiffs.

Mr. *Martindale* for the infant defendant.

Ex parte Ommaney, 10 Sim. 298, was cited. See *Farrar* v. *Lord Winterton*, 4 Y. & Coll. 472.

Between THE DURHAM AND SUNDERLAND RAILWAY COMPANY - - - - Plaintiffs,

and

J. T. WAWN - - - - - - Defendant.

1840.
June 30*th*.
July 18*th*.
22*nd*.
1841.
July 17*th*.

An injunction will be granted at the suit of one tenant in common to restrain a co-tenant dealing with the common property, where the act sought to be restrained amounts to a destruction of the property.

But where five out of six tenants in common of a property under lease at an annual rent of 30*l*. per annum, had granted a renewed lease to a Railway Company at an improved rent of 90*l*., and the other co-tenant refusing to concur in such lease had recovered judgment in ejectment against the lessees, the Court refused to interfere by injunction to restrain that co-tenant proceeding to remove iron rails laid down by the lessees.

THE bill stated the title of the defendant, J. T. Wawn, as tenant by the curtesy, with remainder to his infant son, of one undivided sixth part of certain messuages and quays or wharfs adjoining thereto, situated in Sunderland, the remaining five-sixth parts being vested in the other defendants. The plaintiffs in 1835 applied to the defendants for a lease of the property for the purposes of the railway, and all the tenants in common, except the defendant, J. T. Wawn, agreed to grant a lease of it for ninety-nine years, at the rent of 30*l*. per annum, (which was the rent at which it had been previously let), until the Railway Company should have removed the buildings, and applied the premises for the use of the railway, when the rent of the property was to be raised, and thenceforward continue at 90*l*. a-year. A lease was prepared by the several tenants in common, and was expressed to grant the property to the Company for ninety-nine years, on the terms above stated, with liberty to the Company to pull down the houses, and to erect their works, and lay the railway across the premises; and by the same lease, the Company covenanted at the expiration of the term to replace the property in its former condition. The lease thus prepared, dated the 1st of July, 1835, was executed by the other defendants, the tenants in common; but the defendant J. T. Wawn declined to execute it, and his solicitor returned the draft of the lease to the solicitor for the Company, stating, that he had entered into an agreement to grant the proposed lease. Notwithstanding the

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defendant's refusal, the Company, in August, 1835, entered into possession of the property, and pulled down the houses, and erected other buildings thereon, and laid the railway over part of the premises.

The defendant, Mr. Wawn, by his solicitor, soon afterwards wrote to the solicitor and clerk of the Company, and complained of the course which had been taken. Some correspondence took place on the subject between the parties; and ultimately Mr. Wawn, not being satisfied with the explanation and conduct of the Company, in December, 1835, gave notice of his intention to bring an action against the Company, and he accordingly brought an action of ejectment against the Company to recover possession, but was defeated by the existence of a demise, not determined, which was proved by the Company (*a*). He afterwards brought a second action, and recovered judgment in ejectment (*b*), and soon afterwards caused a writ of possession to issue. The writ of possession was subsequently set aside, and a new writ, confined to one-sixth of the property, was issued on the 11th of May, 1840. The execution of the writ was delayed, in consequence of terms of settlement having been proposed on behalf of the Company. On the 29th of June, the bill was filed. The bill charged, that the defendant, J. T. Wawn, threatened and intended, on being put into possession of his one-sixth, to pull down the works and buildings erected by the Company on the premises, and pull up the railway by violence, and, unless prevented by injunction, would take such proceedings as would in all probability lead to a breach of the peace. The bill prayed, that the defendant, J. T. Wawn, his servants and agents, might be restrained by injunction from pulling down the buildings erected by the Company upon the premises comprised in the

(*a*) See *Doe* d. *Wawn* v. *Horn*, 3 Mee. & W. 333.
(*b*) 5 Mee. & W. 564.

lease, and from taking up the railway which had been laid thereon.

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Mr. *Pemberton*, for the plaintiff, applied *ex parte* for the injunction, according to the terms of the prayer.

The MASTER OF THE ROLLS granted the injunction.

July 18th.

The defendant, J. T. Wawn, moved to dissolve the injunction.

Mr. *Bethell*, and Mr. *Hare*, for the motion.

The injunction can only be sustained on the ground that there is a legal right to be tried, during the trial of which the Court will prevent injury to the property, or that there are equitable circumstances which preclude the defendant from asserting and enforcing his legal right. In this case, the legal right has already been tried. The Court of Exchequer has held, that laying the railway upon the land is ouster, although the mere removal of the buildings, which previously stood upon the land, was not ouster. If, then, the laying down the railway be ouster, the defendant is entitled, in execution of the writ of possession, to take up the railway; and the Court has no jurisdiction to restrain him from so doing.

On the other ground, of equitable circumstances, it is not pretended that there are any which can support the injunction. The defendant had always repudiated the agreement of the lease.

Mr. *Pemberton*, and Mr. *Elderton*, for the Company.

A tenant in common may use his property in the manner most beneficial to himself; but he is not permitted to deal with it so as to destroy the profitable enjoyment by the other tenants in common. In this case, it is plainly most beneficial to all the parties, that the lease of the

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property at a rent, so greatly exceeding its former amount, should be granted; and a tenant for life of one-sixth could not be allowed to prevent the other parties interested from enjoying the advantage of the increased rent. It would be a wilful and wholly useless destruction of the property, to take up the iron rails. In *Hole* v. *Thomas* (*a*), the Court admitted that an injunction would be granted between tenants in common, where some of them apprehended a malicious destruction. So, in *Twort* v. *Twort* (*b*), Lord Eldon said, "that on a case of positive and actual destruction appearing, he had granted an injunction, as that was not the legitimate exercise of the enjoyment arising out of the nature of the party's title to that which belonged to him and the other party."

Mr. *Bethell* replied.

July 22nd. THE MASTER OF THE ROLLS:—I have read the papers in this case, and am of opinion that the injunction cannot be sustained. There are two grounds upon which it has been put by the plaintiffs; namely, acquiescence, and secondly, that the circumstances are such as to amount to wilful destruction of the common property. It cannot be sustained on the first ground, for it appears that the defendant, throughout, has kept the Company at arm's length. On the second point, that it involves the destruction of the property, two cases have been stated, which are material as shewing this, that if property be held by tenants in common, and enjoyed in conformity with their common rights, and one makes wilful destruction of the common property, he will be restrained by the Court. This state of things does not exist; the state of things which now exists was brought about by the plaintiffs, in defiance of the legal rights of the defendant. This, therefore, does

(*a*) 7 Ves. 590. (*b*) 16 Ves. 128.

not appear to come within the principle of the cases cited, and the injunction must be dissolved with costs.

The plaintiffs appealed to the Lord Chancellor.

Mr. *Cooper*, and Mr. *Elderton*, in support of the appeal motion.

Mr. *Bethell*, and Mr. *Hare*, contrà.

July 17th.

The LORD CHANCELLOR said, that he had not disposed of this case, as he had hoped the parties would have found it their mutual interest to make some arrangement which would prevent the necessity of his delivering any judgment in it. He understood that the impediment in the way of arrangement between the parties was rather one of feeling, than the existence of any substantial interest to interpose. Into any considerations of feeling he could not enter. It had been said, that, apart from these considerations, the defendant was not unwilling to execute the lease.

The Counsel for the Defendant.—Mr. Wawn has always expressed himself willing to execute the lease, if a proper acknowledgment were made to him on the part of the Company, of the improper course which had been taken by them, with reference to him. He was not, however, willing to execute the lease under any compulsory proceedings, either at law or in equity. If the bill were dismissed, and the whole costs incurred by the defendant, in both trials at law, and in this Court, as between solicitor and client, paid to him, he would not refuse to concur in the lease which had been executed by the other tenants in common.

The LORD CHANCELLOR.—If the defendant entertains

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any apprehension that the bill will not be dismissed after his execution of the lease, this Court will take care that that shall be done. With regard to the costs, I have no hesitation in saying that the plaintiffs ought to pay the whole costs which are asked by the defendant.

[The Counsel for the plaintiffs and the defendant consented to dispose of the case, by the defendant executing the lease, and plaintiffs dismissing their bill, and paying the costs, as suggested.]

COURT OF EXCHEQUER.

In Michaelmas Term, 1840.

THE GREAT NORTH OF ENGLAND RAILWAY COMPANY *v.* BIDDULPH.

1840. *Nov.* 13.

In an action by a Railway Company for calls, the declaration stated that the defendant subscribed for a sum of money, to wit, &c., towards the undertaking, and for certain shares therein. In the 195th section of their act it was recited, that part of the capital, authorized (by section 1) to be raised, had been subscribed for by several persons "under a contract, binding themselves, their *heirs*, &c."

DEBT for calls.—The first count of the declaration stated, (after describing the Company incorporated by an act, 6 & 7 Will. 4, c. cv.), that whereas the defendant, before the several times of making the several calls in this count and the second count mentioned, to wit, on &c., subscribed for a large sum of money, to wit, £5000, towards the undertaking mentioned in the said act, and in the act (1 Vict. c. cii.), for enabling the said Company to extend their line of railway, and to make two branches therefrom, and for other purposes relating thereto, and for divers, to wit, fifty shares of £100 each in the said undertaking; and whereas the said Company, after the passing of the said first-mentioned act, to wit, on &c., and from thence continually until the commencement of this suit, have been and still are making and constructing the railway

On motion in arrest of judgment, on the ground that the declaration should have alleged the subscription to have been by deed:—*Held*, that the declaration was sufficient after (and *semble* before) verdict.

Semble, also, that in an action against an original subscriber, the Company need not declare specially on the deed executed before the passing of the act, and that a deed is not necessary in the case of subsequent subscribers.

By section 119, the subscribers are required to pay their amount of subscription, as called for by the directors, "at such times and places, and to such persons as shall be directed by the said directors." Section 121 empowers the directors to make calls, at intervals of three months between the days of payment, and requires that twenty-one days' notice shall be given of each call by advertisement, and that the money called for shall be paid to such persons, at such times and places, and in such manner, as in the said notice shall be appointed. A resolution of the directors was made for a call of £8, but did not mention the place where, or person to whom the money was to be paid; but the notice (signed by the clerk under section 183) did specify those particulars:—*Held*, that, assuming the notice to have been the act of the directors, (which was not disputed at the trial), the call was properly made.

Quære, whether there is a distinction between *proprietors* of shares and *subscribers*.

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and other works in the said acts mentioned, and otherwise carrying the said acts into execution; and whereas, also, after the passing of the said first-mentioned act, and whilst the defendant was such subscriber as aforesaid, and entitled to the said shares, to wit, on &c., the directors for the time being of the said Company, then duly appointed pursuant to the said first-mentioned act, made a certain call not exceeding £10 a share, to wit, a call of £8 a share, from the several subscribers to and proprietors of the said undertaking for the time being, upon and in respect of their respective shares therein, according to the said act, the same call being then found by the said directors to be necessary, and being then necessary for defraying the expenses of and carrying on the said undertaking, and the aggregate amount of the said call, and of all other calls made or money paid for or in respect of the said shares, not exceeding £100 on any share; which said call was then made payable by the said directors at a time before the commencement of this suit, and after an interval of three calendar months next after the day appointed for payment of any preceding call had elapsed, to wit, on &c.; and whereas, after the making of the said call, as in this count mentioned, and more than twenty-one days before the same was made payable as aforesaid, to wit, on &c., notice of the said call and of the time at which the same was made payable as aforesaid, was duly given by advertisement then inserted in the several newspapers following,—that is to say, two Durham newspapers, respectively called &c., three Newcastle papers, respectively called &c., and three York newspapers, respectively called &c.,—according to the said first-mentioned act; in and by which said notice a certain place in the said notice mentioned was appointed and notified for payment of the said call, at the said time at which the same was made payable as aforesaid, to the then treasurer of the said Company, to wit, &c.; which period of twenty-one days next after the

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giving of the said notice elapsed before the commencement of this suit, whereby the defendant became liable to pay to the said Company, a large sum of money, to wit, £400, being the amount of the said call upon and in respect of the said shares to which the said defendant was so entitled as aforesaid; yet the said defendant hath not paid the said sum of £400, or any part thereof, or any interest thereon; whereby and by virtue of the said first-mentioned act, an action hath accrued to the said Company, to demand and have of and from the defendant the sum of £400, and interest thereon, after the rate of £5 for £100 for a year, from the time the same became payable as aforesaid, amounting to a large sum, to wit, £100.

The second count stated—that whereas also, afterwards, and whilst the defendant was such subscriber as aforesaid, and entitled to the said shares in the said undertaking, and after the passing of the said acts, and whilst the said Company were so making and constructing the said railway and other works in the said acts mentioned, and otherwise carrying the said acts into execution as aforesaid, to wit, on the several days and times in this count hereafter in that behalf mentioned, the several calls in this count hereafter mentioned were respectively made by the directors for the time being of the said Company, according to the said acts, from the several subscribers to and proprietors of the said undertaking for the time being, upon and in respect of their respective shares in the said undertaking, the same calls being respectively, at the respective times of making the same, found necessary by the said directors, and being respectively then necessary for defraying the expenses of and carrying on the said undertaking, and no one of the said calls exceeding £10 a share, &c., and the aggregate amount of the same calls and all other calls, or money paid for or in respect of the said shares, not exceeding £100 on any share, which same calls respectively, at the respective times of making the

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same respectively, were by the said directors made payable, before the commencement of this suit, on the respective days in this count in that behalf hereafter mentioned, (that is to say), one call of £3 per share, on December 5th, 1837, and payable on January 17th, 1838; (specifying seven other calls). That an interval of three calendar months at least elapsed between the respective days of payment of the calls, and between the day of payment of the first of the same calls, and the day of payment of any preceding call; and that twenty-one days' notice in respect of each of the calls, specifying the days, times and places of payment, was inserted in the proper newspapers; and that the defendant became liable to pay the amount—£2,250. Breach—Non-payment of the calls, or any of them or any part thereof, or any interest thereon, whereby &c., as in the first count.

Third count—That whereas also the defendant, after the passing of the said first-mentioned act, and before the passing of the said act secondly above mentioned, and before the commencement of this suit, to wit, on &c., then and at the time of making the call in this count hereafter mentioned being a *proprietor* of divers, to wit, fifty shares in the said undertaking in the said first-mentioned act mentioned, was and is indebted to the said Company in the sum of £400 for a call, to wit, a call of £8 a share upon his, the defendant's, said shares in this count mentioned, before then, to wit, on &c., made by the directors for the time being of the said Company, pursuant to the said first-mentioned act, and then made payable at a time before the commencement of this suit, to wit, on &c., which said sum of £400 is still due and unpaid; whereby and by virtue of the said first-mentioned act, an action hath accrued to the said Company, &c.

Fourth count.—And whereas also the defendant, after the passing of the said acts and before the commencement of this suit, to wit, on &c., (this count was for eight calls made upon the defendant as *proprietor* of shares amount-

ing to £2,250, in a form similar to that of the third count, but specifying the days of making the calls); whereby and by virtue of the said acts, an action hath accrued to the said Company, &c.

Fifth count.—For £500 interest.

Pleas—1st, to the third and fourth counts, *nunquàm indebitatus*. 2nd, to the first and second counts, that the defendant did not subscribe to the undertaking mentioned in the said acts of Parliament, *modo et formâ*. 3rd, to the first and second counts, that the said Company were not nor are making or constructing the said railway and other works in the said acts mentioned, and otherwise carrying the same into execution, *modo et formâ*. 4th, to the first count, that the directors did not make the said calls, *modo et formâ*. 5th, to the first count, that notice of the call in the said first count mentioned was not duly given, *modo et formâ*. 6th and 7th, to the second count; denials of the making of the calls, and the giving of the notices, as in the fourth and fifth pleas to the first count. 8th, to the first and second counts, that, after the said alleged subscription by the defendant, in the introductory part of the first count mentioned, and before the making of any of the calls in the said first and second counts mentioned, to wit, on &c., the defendant sold, disposed of, assigned, and transferred all his, the defendant's, right, title, and interest of and in the said fifty shares so by him subscribed for as aforesaid, and then and there and thenceforth continually hath ceased to be the proprietor thereof or interested therein; whereof the said Company had due notice. Verification.

At the trial before *Rolfe*, B., at the Durham Summer Assizes, 1840, it appeared that the defendant had, before the passing of the Company's first act, (6 & 7 Will. 4, c. cv), executed the subscription deed, required by the parliamentary regulations, for fifty shares in the undertaking, and had received scrip for his shares. By that act the Company were empowered to make a railway from the river Tyne to

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the river Tees. By the second act, (1 Vict. c. cii.), they were empowered to extend their line of railway from its termination near the river Tees to near the city of York, and to make two branches. A small portion of the line, authorized by the first act, had been commenced, and the whole of that line surveyed, and £100,000 paid for land. The line authorized by the second act was nearly finished. The amount claimed by the Company from the defendant was in respect of forty shares, he having disposed of ten. The defendant had not been *registered* as a proprietor. On the 10th of August, 1836, the directors resolved upon a call of £8 per share; but the resolution, although it mentioned the time when the call was to be paid, did not specify the place where, or the person to whom, the payment was to be made. The following notice, however, in respect to this call, was inserted in the local newspapers, as required by the Company's first act:—

"Great North of England Railway.

"Notice is hereby given, that at a meeting of the Directors of the Great North of England Railway Company held this day, a call of £8 per share was ordered to be paid to the treasurer of the Company, at the bank of Messrs. Backhouse & Co., in Darlington, on or before Monday the 5th day of September next.

(Signed by order) "F. MEWBURN,
"Clerk to the Company."

"Darlington, August 10, 1836."

At the trial, it was objected for the defendant, that the amount of the first call of £8 a share was not recoverable, as the resolution of the directors did not specify the place where, or the person to whom, the call was to be paid; and it was also insisted, that the defendant was at all events entitled to a verdict on the third and fourth counts, on the ground that there was no evidence of his being a "proprietor" of shares. The learned Judge overruled the objection; and as he thought there was evi-

dence of proprietorship, a verdict was taken for the plaintiffs for £2,325, (including the amount of the first call), on the third and fourth, as well as on the first and second counts. It was not objected that the notice of the first call, inserted in the newspapers, was not proved by extrinsic evidence to be the act of the directors.

Wightman, in the following term, obtained a rule to shew cause why the judgment on the first and second counts should not be arrested, or the verdict be set aside, and a new trial had, unless the parties agreed to reduce the verdict by the amount of the first call and interest, or why there should not be a new trial (*a*).

(*a*) The material sections of the act, referred to in the argument, were as follows :—

By section 3, it is enacted, "that it shall be lawful for the said Company to raise amongst themselves any sum of money, for constructing and maintaining the said railway and other works by this act authorized, not exceeding in the whole the sum of £1,000,000, the whole to be divided into shares of £100 each, and such shares shall be numbered, beginning with number one, in arithmetical progression, and every such share shall be distinguished by the number to be applied to the same; and the said shares shall be and are hereby vested in the several parties taking the same, and their several and respective successors, executors, administrators, and assigns, to their proper use and benefit, proportionably to the sum they shall severally contribute; and all corporations and persons and their several and respective successors, executors, administrators and assigns, *who have subscribed or shall severally subscribe for* any such share, or such sum as shall be demanded in lieu thereof, towards the said undertaking and other the purposes of the said subscription, shall be entitled to and receive, in proportionable parts, according to the respective shares so by them respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same shall be divided by the authority of this act."

By section 100, it is enacted, "that the directors for the time being of the said Company shall superintend all the affairs thereof, and shall have the custody of and power to use the common seal of the said Company on their behalf, and shall have full power and authority to do all acts whatsoever for carrying into effect the purposes of this act, and for the management, regulation, and direction of the affairs of the said Company, or relative thereto, which the said Company are by this act authorized to

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Cresswell, Addison, and *S. Temple* shewed cause.—First, as to the reduction of the verdict by the amount of the first call. As the execution of the subscription deed by the defendant, and the passing of a resolution of the directors

do, except such as are herein required and directed to be done at some general or special general meeting of the said Company." (Powers are then given to the directors to appoint and displace officers and servants, and to allow salaries, &c., and to meet and adjourn; five directors are made necessary to constitute a meeting; all questions are to be determined by a majority of the directors present; each director is to have but one vote, except the chairman, who is to have a casting vote; the directors are to "keep a regular minute and entry of their proceedings at every meeting of the said directors," and accounts of all monies disbursed and received. The section then proceeds)—"and shall regularly enter into some book, to be from time to time provided at the expense of the said Company for that purpose, notes, minutes, or copies, as the case shall require, of such appointments, receipts, and disbursements, and of all contracts and bargains entered into or made by them, and of other their orders and proceedings, and which books shall be deposited with and kept under the care and direction of the said directors." Proviso.—That the directors shall not fix their own remuneration, and shall take security from persons having the custody or control of any money received by virtue of this act.

By section 101, the directors are empowered to appoint committees out of their own body, with authority to make contracts, to employ agents, &c., and to do all things which the directors are authorized to do, "*save and except, nevertheless, the making of calls for money upon the proprietors of the said undertaking.*"

By section 103, it is enacted, "that the orders and proceedings of all meetings, as well general as special, of the said Company, and of the said directors and committees respectively, shall be entered in some book, to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, and before all judges, justices, and others, and that without due proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors, or being directors or members of the committee, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be presumed."

Section 119—"That the several parties who have subscribed, or who shall hereafter subscribe for or towards the said undertaking, shall, and they are hereby required to pay the sums of money by them respectively subscribed for, or such

for the call in question, fixing the time of payment, and the publication of a notice, signifying the time and *place* of payment, and naming the *payee*, were duly proved, the only question is, whether the resolution, omitting the two

parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under and by virtue of the powers of this act, at such times, and at such places, and to such persons as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid, the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any Courts of law or equity, together with interest on such unpaid sum of money, at the rate of £5 per centum per annum, from the time when the same was directed to be paid as aforesaid up to the day of actual payment thereof."

By sect. 121, it is enacted "that the directors, to be appointed as aforesaid, shall have power from time to time to make such calls of money from the subscribers to and proprietors of the said undertaking for the time being, to defray the expenses of, and to carry on the same, as they from time to time shall find necessary; so that the aggregate amount of calls made, or money paid for or in respect of any such shares, shall not amount to more than the sum of £100 on any such share, and so that no such call shall exceed the sum of £10 upon any such share, which any corporation or person shall be possessed of or entitled unto in the said undertaking; and an interval of three calendar months, at the least, shall elapse between the day appointed for payment of one call, and the day appointed for payment of another call; and twenty-one days' notice, at the least, shall be given of every such call by advertisement inserted in two or three Durham, Newcastle, and York newspapers aforesaid; and all monies so called for shall be paid to such person, at such times and places, and in such manner, as in the said notice shall be appointed; and the respective proprietors of shares in the said undertaking shall pay the ratable proportion of the monies to be called for as aforesaid, to such persons, and at such times and places, and in such manner as shall be appointed as aforesaid; and if any proprietor for the time being of any such share shall not so pay such his ratable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same after the rate of £5 per centum per annum, from the day appointed for the payment thereof, up to the time when the same shall be actually paid; and if any proprietor for the time being of any such share shall neglect or refuse to pay such his ratable proportion, together with interest, (if any), then, or at any time thereafter, it shall be lawful for the said Company to sue for and recover the same in any of his

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latter particulars, was incorrect and inoperative. The notice, duly authenticated and published, is the appointed medium of information to the shareholders; and the naming either of time or place of payment, or of the person to

Majesty's Courts of Record, by action of debt or on the case, or by bill, suit, or information; or the said directors may, and they are hereby authorized to declare the shares belonging to such proprietors to be forfeited, and to order such shares to be sold." Proviso, —That notice must be given of the declaration of forfeiture, which is to be confirmed at a meeting of the Company, after which the forfeited shares may be disposed of; that a solemn declaration before a magistrate, or master extraordinary in Chancery, of the call, notice, and default of payment, shall be evidence of the facts therein stated; and that the declaration, and the receipt of the treasurer, shall be sufficient evidence of a purchaser's title.

By section 123—"That, in any action to be brought by the Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call, or so many calls, of such sums of money, upon a share belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid, on such calls, unless it shall appear that any such call exceeded £10 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required. And in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book, in which the clerk of the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the several corporations and persons who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be primâ facie evi-

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receive, in a resolution as well as in a notice, cannot be either useful or important. [*Alderson*, B.—If a notice varies from a resolution as to the time or place of payment, how ought the payments to be made?] According to the notice, to which alone the shareholders can look for information. If the directors are not at liberty to determine generally upon a call, leaving the appointment of the payee, and of the time and place of payment to be fixed by a subsequent notice; or if they have not even the power to cancel the original, and to make different appointments, the insolvency of a banker, selected by a resolution, may occasion the loss or delay the collection of a call. Section 121 empowers the directors to make calls, limits their amounts, and prescribes the intervals between them, and between the times of giving notice

dence, that such defendant is a proprietor, and of the number and amount of his shares therein."

By section 183 it is enacted, "that in all cases in which it may be necessary for the said Company to serve any summons or demand, or any notice, or any writ or other proceeding at law or in equity, or otherwise, upon any corporation or person, under the provisions of this act, personal service thereof respectively upon such person, or upon some member, or upon the clerk or other officer of such corporation, or delivering the same to some inmate of the last or usual known place of abode of such person, or of such member, clerk, or other officer of such corporation, or at the office of such clerk or other officer, shall be deemed good and sufficient service of the same respectively upon such corporation or person (as the case may be), except in cases in which any other mode of service is by this act particularly directed. Provided always, that every summons, demand, or notice, or other document requiring authentication by the said Company, may be signed by the clerk or treasurer of the said Company, and need not be under the common seal of the said Company, and may be in writing or in print, or partly in writing and partly in print."

And section 195, after reciting "that the probable expense of making the said railway and other works hereby authorized, amounting to the sum of £660,000, has been already subscribed for by several persons, under a contract binding themselves, their heirs, executors, administrators, and assigns, for the payment of the several sums by them respectively subscribed for," enacts, that the act may be put into execution immediately after the passing thereof.

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and of payment; but gives no directions as to the particulars of the resolutions. It specially requires, however, public notice to be given, and the monies called for to be paid, "to such persons, at such times and places, and in such manner *as in the said notice* shall be appointed." According to this section, then, the notice only need be specific; and that such is the correct construction, appears from the proviso to section 183; under which, notices, requiring authentication by the Company, may be signed by the clerk or treasurer, and need not be under the common seal of the Company. Further, as every "subscriber" is entitled to a proportion of the net profits of the undertaking, (section 3), and is liable for calls, (sections 119 and 121), he, must be deemed a "proprietor" within the meaning of section 123, which relates to actions against "any proprietor for any call." Now, the only evidence, in addition to that of proprietorship, required by this section is, that "such call was in fact made, and that such notice was given as is directed by this act." In this case, the fact of making the call in question was sufficiently proved by the resolution put in; and the correctness of the notice, *per se*, was not disputed. The defendant's liability for the first call was, therefore, established according to the requisitions of the act. *Moore* v. *Hammond* (*a*), was an action for a call against a proprietor of shares in a joint stock Company, formed under a deed of settlement. The action was held not to be maintainable, because the meeting of the directors, at which the call was resolved upon, had not been previously agreed upon by them; and the deed of settlement required such previous agreement. There, the directors had clearly acted beyond the scope of their authority. Here, no preliminary requisite to fix the defendant with liability has been omitted.

2. As to the motion in arrest of judgment, on the first and second counts, it will be contended, that the defendant's

(*a*) 6 B. & C. 456, 9 D. & R. 482.

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liability, as "a subscriber," must depend upon his execution of a deed; and that those counts ought not only to have alleged that fact, but also to have been framed specially on the subscription deed. The *first* answer to this position is, that, as the objection must rest solely upon what appears upon the face of these counts, taken in connection with the act of Parliament, there is nothing to shew the necessity of a deed. By section 1, certain persons named, "and all other corporations and persons who have subscribed, and shall hereafter subscribe," are incorporated; and sections 8 and 119 refer to present and future subscribers; but no allusion is made to any deed. It is true that, from the use of the word "heirs" in the preamble to section 195, it appears that several persons had, before the passing of the act, subscribed for part of the capital of the Company, by a contract under seal. But there is no expression in the preamble or the enactment, from which it can be inferred that future subscribers must bind themselves by a contract of the same species. Now, as there is as much reason for presuming the defendant to be one of the subsequent, as that he was one of the original subscribers, it cannot be affirmed that any deed was either necessary, or, in fact, executed by him; and, therefore, the objection entirely fails. *Secondly*, if, as before contended, the defendant is to be considered as a "proprietor" within the meaning of section 123, it is clear that a deed, if necessary at all, is necessary only as evidence of proprietorship; for that section gives a general form of declaring, without referring to any deed. The two are of course answers also to the latter branch of the objection, viz. that a deed ought to have been specially declared upon. But, *thirdly*, if the execution of a deed be a condition of the defendant's liability, it could not have been specially declared upon. It has been shewn that no deed can be absolutely assumed, except one executed before the passing of the act, to which the Company could not have been

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party or privy; as it must have been executed before their existence, in conformity with the rules of Parliament. The action is given by and founded upon the act, and not on the subscription deed, which, therefore, under any circumstances, can be only inducement. *Bayfill* v. *Leigh* (*a*). *Fourthly*, assuming the necessity of a deed, and that the first and second counts would be bad on demurrer for omitting to allege it, the omission is cured by the verdict. The rule on this subject, laid down in 1 Wms. Saund. 228, in note (1) to *Stennel* v. *Hogg*, is, that, "when there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict at the common law." This rule was recognised in *Rushton* v. *Aspinall* (*b*), *Rawson* v. *Johnson* (*c*), and *Jackson* v. *Pesked* (*d*). In this case, a distinct issue is taken by the second plea, upon the allegation of subscription; and if the defendant could not become a subscriber except by deed, it must be presumed after verdict, (as the fact indeed was), that the plaintiff adduced the necessary evidence, viz. a deed.

Besides, the defendant, though not a registered subscriber, must be deemed a "proprietor" within the meaning of the act of Parliament; and, therefore, if the judgment be arrested on the first and second counts, the plaintiffs are entitled to retain the verdict to the full amount under the third and fourth, which charge the defendant with liability as a "proprietor."

(*a*) 8 T. R. 571. See *Dangerfield* v. *Thomas*, 9 A. & E. 292.
(*b*) 2 Dougl. 679.
(*c*) 1 East, 203.
(*d*) 1 M. & S. 234.

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W. H. Watson, (*Wightman* with him), contrà.—First, as to the reduction of the verdict by the amount of the first call. The shareholders are entitled to the benefit of the judgment and discretion of the directors, who are the superintendents and managers of the affairs of the Company, (section 100), and who, like agents and arbitrators, cannot delegate their authority. (section 101). The importance of a proper appointment of the place of payment, and of the payee of calls, has been shewn by reference to the contingency of a banker's insolvency; and is manifest also with a view to the convenience of the shareholders, who may reside in different parts of the country remote from each other. This appointment ought, therefore, to be the act of the directors; and this appears from section 119, which must be read in connection with section 121, and which directs subscribers to pay their subscriptions "at such times, and at such places, and to such persons, as shall be directed *by the said directors*." The appointment, as an "order or proceeding" of the directors, must be entered in a book, and signed by the chairman. (section 103. See also section 100). And when so entered and signed, it is to be deemed an "original" order or proceeding, (section 103). The provisions for the appointment by the directors, and the entries, are not superfluous, nor inconsistent with the direction of section 121, that the notice also, which may be signed by the clerk or treasurer, (section 183), shall mention time, place, and person. By the resolution of the directors, the shareholders, (who have access to the books,—section 117), may be assured of the propriety of the making of the call, and of the method of collecting it. By the notice of the clerk or treasurer, they are informed of the fact of a call having been resolved upon. If they do not correspond, the notice, though complying in point of form with section 121, must be bad, as unauthorized by the resolution. A notice, correct in form, cannot cure a bad resolution; *both* must conform to the

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requisitions of the act. If it be held that they need not correspond, a resolution of the directors may be superseded by a notice of the clerk or treasurer, requiring payments to be made in a manner at variance with the deliberate determination of the directors. [*Alderson*, B.—It appears that no objection was taken at the trial, that the notice in question was not proved to have had the sanction of the directors.] It ought to have been distinctly proved by the plaintiffs. [*Parke*, B.—It is to be presumed, the notice not having been challenged for want of that proof. The notice was regular on the face of it, and professed to have been ordered by the directors.] The necessity of direct proof arose when the variance appeared between the resolution and the notice.

It has been contended that section 123 shews the resolution to be sufficient. But that assumes, first, that the word "proprietor" includes "subscriber;" and secondly, that making a call means only resolving upon the payment of sums of money, without specification of time, place, or of a person to receive payment. 1. Subscribers and proprietors are clearly recognised by the act as distinct classes. [*Parke*, B.—A subscriber seems to me to be a proprietor within the meaning of the act.] Section 121 makes a distinction by mentioning both terms; and sections 86 and 115, describing the first meeting as a meeting of "the Company," seem to shew that registration is necessary to make a subscriber a proprietor; consistently with which supposition, the latter word is used alone in sections 86, 87, 89, 91, 92, 93, 94, 98, and 118. All these sections refer, for the most part, to proceedings *after* the first meeting, at which registration generally is supposed to take place; and this accounts for the word "proprietor" being alone used. But the present defendant has not been registered; and though every proprietor may in one sense be a subscriber, either as an original subscriber registered, or as the transferee of a

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shareholder, yet every original subscriber is not a proprietor until registration has taken place. [*Alderson*, B. —By section 121 the directors may make calls from the "subscribers to, and proprietors of, the said undertaking;" and then, in a subsequent part of the section, an action is given against "proprietors" in default. Does not this prove the terms to be used synonymously?] It rather shews the terms to be used in different senses; for by section 119 an action is given against subscribers. [*Alderson*, B.—By section 120 "proprietors" are enabled to pay their *subscriptions* in advance; and by section 90 persons "who have subscribed for, or become entitled to shares," may vote by proxy; and the form of proxy given is,—"A. B. of ——, one of the proprietors," &c.] Those sections, which are of general application to all future times, appear to assume that registration of subscribers would take place at the first meeting, at which it would most likely be the first transaction. 2. It is unduly assumed by the other side, that the phrase in section 123, —"such call was in fact made,"—means a mere resolution to pay money, without specification of time or place of payment, or of the person to receive. This is obviously to beg the whole question, which relates to the necessity of such a specification.

Secondly, as to the motion in arrest of judgment on the first and second counts.—1. A deed was necessary to make the defendant liable as a subscriber. It has been admitted that the use of the word "heirs," in the preamble to section 165, shews that original subscribers had contracted by deed; and the fair presumption must be, that future subscribers would contract in like manner. If so, those counts ought to have alleged a contract by deed, as the foundation of the defendant's liability; but they do not shew any such legal obligation. 2. If the reasons offered to prove section 123 to be inapplicable to "subscribers," be valid, the argument on the other side, upon this point, derived from

COURT OF COMMON PLEAS.

In Michaelmas Term, 1840.

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Nov. 13.

PRIESTLEY *v.* FOULDS.

By an inclosure act (12 Geo. 3, c. xxxviii.) a portion of a certain drain, called the Fleet Drain, which separated the townships of Whitley and Egbrough, in the county of York, was declared, for the purpose of cleansing and repairing, to be in the township of W., which from time to time cleansed it accordingly.

The act, 1 Geo. 4, c. xxxix., gave power to the undertakers of the Aire and Calder Navigation to make a navigable canal through the said townships. By sect. 1, they are *enabled* to make proper and convenient drains on the sides of the canal, as a substitute for the Fleet Drain, (a portion of which was intended to be used as part of the line of the canal), and for that purpose to enter lands &c. By sect. 32, the lands purchased, taken, or used, together with the canal, drains, &c., thereby authorized to be made, are vested in the undertakers. Section 85 *requires* them, at their own costs, to make a drain on each side of and parallel with the canal, in lieu of that part of the Fleet Drain which would be so destroyed, at least twelve inches deeper than the old drain. Sect. 86 *requires* them to make all such arches, tunnels, culverts, drains, or other passages, over, under, &c., the said canal, as should be sufficient at all times to convey the water clear from the lands adjoining or near to the said canal, without obstructing or impounding the same; and to make such back-drains as might be necessary to carry away any water which might ooze through the banks of the canal: and provides, that all *such* arches, tunnels, culverts, *drains*, back-drains, &c., should, from time to time, be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said undertakers.

The substituted drain on the north side of the canal, being straight, did not enter the township of Whitley at all, but was wholly in Egbrough, which was never liable to cleanse or repair the Fleet Drain.

Held, that the general words in section 86 included the specific works mentioned in section 85, and that the undertakers were bound to keep in repair the substituted drains, as well as make them.

ASSUMPSIT.—This was an action brought by Joseph Priestley, clerk to the undertakers of the Navigation of the rivers Aire and Calder, acting under and by virtue of divers acts of Parliament, and amongst others a certain act (1 Geo. 4, c. xxxix), to recover the sum of £50.—Plea, *non assumpsit*.—It was, on the 14th of January, 1840, ordered by *Bosanquet*, J., that the facts should be stated in a special case for the opinion of the Court, and that judgment should be entered for the plaintiff or defendant by confession, or *nolle prosequi*, as the Court should think fit.

CASE.—The Fleet Drain was an ancient drain, commencing on Knottingley common lands, and terminating in the river Went, in the county of York. Its course or direction, prior to the making of the cut or canal from Knottingley to Goole, was irregularly through the several

townships between Knottingley and Pollington, both inclusive, and from thence to the river Went. It received the drainage water of the greater portion of nine townships situate in the line thereof, and was in length about eight or nine miles.

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The lands through which the drain passed, were formerly common and waste grounds, but were all inclosed long previous to the making of the Knottingley and Goole canal.

By an act (12 Geo. 3, c. xxxviii (*a*)), after directing the commissioners therein named to set out, make, and widen all fences, ditches, drains, water-sewers, cloughs, bridges, and other requisites, in, over, or upon the lands and grounds inclosed and to be inclosed in the said several townships, (which included the said Fleet Drain, so far as the said townships extended, and the portion of such Fleet Drain now in dispute), it was enacted "that all such public drains, water-sewers, cloughs and bridges, when so set out, made, and widened as aforesaid, should from time to time be cleansed, repaired, and kept in repair by the inhabitants of the respective townships within which they were situate, in such manner, and the expenses thereof were to be raised and assessed in the same way, as any other public or parochial rates or taxes were by law provided to be assessed, raised, and levied; and that the constable within each of the said townships for the time being should for ever thereafter cause the said public drains, &c., to be cleansed and put in sufficient repair twice in every year, to wit, on or before June 10th and September 29th in every year:" and it was provided that the same ways and means, by presentment, indictment, or otherwise, might be taken for com-

(*a*) Intituled "An act for dividing and inclosing the open commons, arable fields, and the common meadows, pasture grounds, commons, and waste grounds within the townships of Pollington, Baln, Whitley and Whitley Thorpe, Great Heck and Little Heck, in the parishes of Snaith and Kellington, in the county of York."

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pelling the said public drains, &c., to be cleansed and kept in repair, as if that act had not passed.

The commissioners named in the act carried into execution the directions therein contained, as regarded the Fleet and other drains, and one part of the Fleet Drain, they, by their award, declared to be in the townships of Whitley and Whitley Thorpe; and, according to the provisions of the same statute, such part of the said Fleet Drain was, until the making of the Knottingley and Goole Canal, scoured and cleansed by the townships of Whitley and Whitley Thorpe, by means of a rate levied on such townships. The Fleet Drain was the boundary between Beal and Criddling Stubbs, Whitley, and Kellington and Egbrough, but ran through the townships of Heck and Pollington. It was always cleansed and repaired in the following manner:—by the township of Beal against or opposite to Criddling Stubbs; by the township of Whitley against or opposite to the townships of Kellington and Egbrough; and by the respective townships of Heck and Pollington, so far as the same ran through these townships: so that the townships of Criddling Stubbs, Kellington and Egbrough, never had any part of the Fleet Drain to cleanse out.

Floods sometimes occurred in the river Went, when the water backed up the course of the Fleet Drain to about the bridge in Pollington, called Barker's Bridge.

An act of Parliament passed (1 Geo. 4, c. xxxix) (*a*). [The case here set out the 1st, 3rd, 32nd, 73rd, 85th, and 86th

(*a*) Intituled "An act to enable the undertakers of the Navigation of the rivers Aire and Calder, in the West Riding of the county of York, to make a navigable cut or canal from and out of the said navigation at Knottingley, to communicate with the river Ouse, near Goole, with two collateral branches, all in the said Riding, and to amend the acts relating to the said navigation."

By sect. 1, the undertakers were empowered to make, complete, and maintain a cut or canal from and out of a certain other cut in the township of Knottingley, in and through the several townships and places in such act mentioned, to join and communicate with the

sections, and then proceeded].—Under the authority of this act, the undertakers of the Aire and Calder Navigation river Ouse at or near the outfall of the Dutch River, in the township of Goole, and also to make and maintain the other cuts and branches in the said act mentioned; and to make such trenches or passages for water, in, upon, or through the lands or grounds adjoining to the said proposed canal and cuts, as the said undertakers should think fit; and to make proper and convenient soke-drains or passages for water, on the side or sides of the said first-mentioned cut or canal from or near to Stubbs Lane, in the township of Knottingley aforesaid, to a certain place near to New Bridge, with a proper sluice or tide-gate to the same, as a substitute for the then present drain or dyke, called the Fleet Drain, which, from Stubbs Lane aforesaid to a certain place at the extremity of the township of Pollington aforesaid, was intended to be used as part of the line of the said first-mentioned cut or canal; and for the purposes aforesaid, or any of them, to enter into and upon the lands and grounds of any person or persons whomsoever and whatsoever, and to set out and ascertain such parts thereof as they should think necessary and proper for making the said proposed canal, and the cuts or branches, and drains, feeders, bridges, aqueducts, towing-paths, basons, docks, wharfs, warehouses, and all such other works, matters, and conveniences as they should think proper and necessary for effecting, preserving, completing, maintaining, and using the said canal and cuts or branches, and other works; and also to bore, dig, cut, trench, sow, excavate, get, take, or remove, carry away, and lay earth, clay, stone, soil, rubbish, timber and other trees, beds of gravel or sand, or any other matters or things which might be dug or got in making the said canal and cuts or branches, drains, feeders, aqueducts, or other works, out of or upon the lands and grounds of any person or persons adjoining or lying contiguous thereto, and which might be proper, requisite, or necessary for making, carrying on, continuing, maintaining, or repairing the said canal, cuts or branches, drains, and other works, or which might hinder, prevent, or obstruct the making, using, or completing, extending, or maintaining such feeders, trenches, tunnels, passages, aqueducts, and water-courses as should be necessary and proper to convey water from the said canal and cuts or branches, according to the true intent and meaning of the said act; and to make, build, erect, and set up, in or upon the said canal and cuts or branches and drains, or either of them, or upon the lands adjoining the same respectively, such and so many bridges and aqueducts, and such and so many piers, arches, tunnels, sluices, flood-gates, stop-gates, weirs, pens for water, water-tanks, drains, wharfs, quays, houses, warehouses, toll-houses, watch-houses, landing-places, weighing-beams and cranes or other machines, docks, dry-docks, basons, and other works, ways, roads, and

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made a cut or canal from Knottingley to the river Ouse near Goole, and in making it they adopted the line of the

conveniences, as and when the said undertakers should think necessary and convenient; and also from time to time to alter, repair, and amend, or discontinue the same; and also to make, maintain, repair, and alter any fences or passages over, under, or through the said canal and cuts or branches, drains, and other works, or the tunnels, archways, aqueducts, trenches, passages, feeders, water-courses, and sluices respectively, which should communicate therewith; and also to make such roads and ways, culverts, and bridges, as the said undertakers should think necessary and expedient for the use and occupation of the owners or occupiers of any such lands and grounds as should be cut through, separated, or divided, or otherwise affected by, or the use or occupation of which should be obstructed or rendered inconvenient in consequence of, the making the said canal and cuts or branches and drains, or any of them; and to construct, erect, make, and do all other matters and things which they should think convenient and necessary for working, effecting, preserving, improving, completing, and using the said canal, cuts, or branches and drains, and other works, in pursuance of, and according to, the true intent and meaning of the said act, they the said undertakers doing as little damage as might be in the execution of the several powers to them thereby granted, and making satisfaction in manner therein mentioned to persons interested in lands, messuages, buildings, tenements, and hereditaments, waters, water-courses, brooks, and streams respectively, which should be taken and removed, diverted, or prejudiced, for all the damages to be by them sustained in or by the execution of all or any of the powers of the said act; subject nevertheless to such provisions and restrictions as are therein contained.

By section 3, it was provided, that the lands or grounds and hereditaments to be taken and used for the said canal, cuts, soke and other drains, and the towing-paths and banks thereof, and the ditches and fences for separating such towing-paths and banks from the adjoining land, should not exceed sixty yards in breadth, except in the cases therein particularly mentioned.

By section 32—That all and every the lands, grounds, and hereditaments to be purchased, taken, or used by virtue of the powers of the said act, for the purposes thereof, together with the canal, cuts, drains, and other works thereby authorized to be made, and all and every the messuages, buildings, warehouses, wharfs, quays, tenements, and hereditaments, which should be erected, or built, or provided under the powers of the said act, and all the rates, tolls, and duties by that act granted, should be and stand vested in the same trustees, their heirs, and assigns in the same manner, with the like indemnification, and upon the same trusts, and for the like purposes, and the

Fleet Drain as nearly as possible; but, from the irregular line of the drain, and the comparatively straight course of the canal, it followed that the canal was sometimes formed

profits and advantages to arise under the said act should be applicable to such and the same uses and purposes, as the property of the said undertakers in the Navigation of the said rivers Aire and Calder, and the canals and other works authorized to be made by the said therein recited acts, were or stood vested in, and were applicable to.

Section 73 requires the said undertakers to make and maintain bridges, arches, and passages across the canal, drains, &c.

By section 85 it was enacted, that the undertakers should, and they were thereby required, at their own costs, to make or cause to be made a drain on each side of and parallel to the said canal, from Stubbs Lane, in the township of Knottingley, to near the eastern extremity of the township of Pollington, in lieu of that part of the said Fleet Drain which would be so destroyed, and at the last-mentioned place the waters from the north drain should be passed under the canal by means of a culvert, and conveyed, together with the water in the south drain, along the south side of the canal, by a sufficient drain, to the river Dun at or near to New Bridge, where a proper sluice or tide-gate should be erected, the area of the waterway of which should not be less than fifty-four square feet. Provided always, that the said drains at their commencement at Stubbs Lane aforesaid, should be at least twelve inches deeper than the then present drain at that place.

By section 86 it was further enacted, "that the said undertakers should, and they were thereby required, at their own costs, to make or cause to be made such arches, tunnels, culverts, drains, or other passages, over, under, by the side of or into the said canal and the trenches, streams, and watercourses communicating therewith, and the towing paths on the sides thereof respectively, of such depth, breadth, and dimensions as should be sufficient at all times to convey the water clear from the lands adjoining or lying near to the said canal, without obstructing or impounding the same; and likewise to make or cause to be made such back-drain or drains as might be necessary and sufficient to carry away any water, which might ooze or pass through any of the banks of the said canal, to the prejudice of any of the lands or grounds contiguous or near thereto. And that all such arches, tunnels, culverts, drains, back-drains, and other passages should, from time to time, be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said undertakers; and if at any time, after twenty days' notice in writing should, by or on behalf of any owner of land adjoining or lying near to the said canal, be given to the said undertakers that the said arches, tunnels, culverts, drains, back-

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By section 86 it was further enacted, "that the said undertakers should, and they were thereby required, at their own costs, to make or cause to be made such arches, tunnels, culverts, drains, or other passages, over, under, by the side of or into the said canal and the trenches, streams, and watercourses communicating therewith, and the towing paths on the sides thereof respectively, of such depth, breadth, and dimensions as should be sufficient at all times to convey the water clear from the lands adjoining or lying near to the said canal, without obstructing or impounding the same; and likewise to make or cause to be made such back-drain or drains as might be necessary and sufficient to carry away any water, which might ooze or pass through any of the banks of the said canal, to the prejudice of any of the lands or grounds contiguous or near thereto. And that all such arches, tunnels, culverts, drains, back-drains, and other passages should, from time to time, be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said undertakers; and if at any time, after twenty days' notice in writing should, by or on behalf of any owner of land adjoining or lying near to the said canal, be given to the said undertakers that the said arches, tunnels, culverts, drains, back-

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out of part of the Fleet Drain, and also frequently crossed it, leaving several disjointed portions thereof on each side of the canal.

The undertakers, in making the new drains on each side of this cut or canal, in lieu of the Fleet Drain, made use of the disjointed portions of the old drain, where they were available; and after straightening and enlarging them, connected the same by new drains, so as to form two distinct lines of drainage throughout the whole length.

The new portions of the drains, and the portions used of the old Fleet Drain, were made twelve inches deeper than the old drain, at their commencement at Stubbs Lane. Near the eastern extremity of Pollington, the undertakers made a culvert under the canal, for passing the water from the north drain into the south drain, where it meets the ancient course of the old Fleet Drain; and for carrying off the combined waters of the two drains, they continued the

drains, or other passages, or any of them, was or were not made, cleansed, maintained, and repaired, according to the true intent and meaning of the said act, it should be lawful for any person or persons to apply for and obtain an order in writing, from any two or more of the justices of the peace for the West Riding of the county of York, from time to time, as often as there should be occasion, (and the said justices were thereby authorized and empowered, at their discretion, to make and grant such order as aforesaid), enabling such person or persons to cleanse and repair such arches, tunnels, culverts, drains, back-drains, or other passages accordingly, and the reasonable expenses thereof, (to be ascertained by such justices), should be defrayed by the said undertakers. And, in case of neglect or refusal to satisfy and defray such expenses, for the space of ten days after demand thereof made upon the said undertakers, such expenses should and might be levied and recovered by distress and sale of the goods and chattels of the said undertakers, in the same manner as any other costs and charges might by virtue of that act be levied and recovered from the said undertakers: provided, nevertheless, that nothing therein contained should extend to enforce or authorize the admitting of any water arising from any floods into the said canal, which might injure the said navigation."

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south drain from the same point of the eastern extremity of Pollington, along the south side of the canal, to the river Dun, near New Bridge. The former outfall of the Fleet Drain into the river Went is still open, and part of the water continues to run that way. The continuation of the drainage made by the undertakers, and the last-mentioned continuation of drainage, (which was made by them in 1826), as well as the sluice or tide-gate into the river Dun, have always, since the year 1831, been repaired by the undertakers, and no other persons have at any time since the making thereof repaired or maintained the same.

All these works were completed several years since.

The lands between the old portions of the Fleet Drain and the canal have, with some trifling exceptions, been purchased by the undertakers, as well as the lands now constituting the new drains. The undertakers do not make use of the new drains for any purpose whatever connected with the canal; but they or their tenants, as owners or occupiers of the lands so purchased by them as aforesaid, together with the other owners or occupiers of lands on the sides of these drains, have the benefit of the drains for the drainage of such lands, which were formerly served by the Fleet Drain. There is no apparent back water from the canal which enters these drains, nor does there appear to be any oozing from the banks of the canal; and the drains are ample and sufficient, when properly cleansed and scoured, to take away all the water from the adjoining lands; but should there be any oozings from the canal, there are no other means of taking them away, save by the said drains.

J. B. S. Morrett is the owner, and the defendant is the occupier of certain lands in the township of Egbrough, on the north side of the canal, partly bounded by portions of the ancient course of the Fleet Drain, but more by a portion of one of the connecting drains made by the undertakers. The undertakers have not purchased a strip of land belonging to Mr. Morrett's estate, which lies on the

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south or opposite side of the canal; nor have they purchased a strip of land belonging to Sir Samuel Crompton between the drain and the canal, as they declined to sell them. These are the exceptions above referred to. There are other owners and occupiers of lands in the same township, similarly situated and bounded to those of Mr. Morrett.

Prior to the alteration of the Fleet Drain under the authority of the above-mentioned act, and the formation of the two lines of drainage, (one on the Whitley side of the canal, and the other on the Egbrough side, as hereinbefore described), both Mr. Morrett, and his tenant, the defendant, and the other owners and occupiers of lands in Egbrough, adjoining the Fleet Drain, had such lands drained by it, free of any charge to them or any of them in respect of the said drain; the Fleet Drain being, so far as the same bounded the said township of Egbrough, cleansed and repaired by the township of Whitley solely.

The township of Whitley refuses to cleanse or repair the two drains made by the undertakers in lieu of the old Fleet Drain, or, at all events, the drain on the Egbrough side of the canal; on the alleged ground that it is a new and additional burthen, which they contend the act does not impose upon them, and which they are not on any other ground subject to; because the drain on that side of the canal, so far as it consists of portions of the old Fleet Drain, is severed by the canal from the remaining lands of their township of Whitley; and so far as it consists of the new connecting portions of drain, is wholly out of their township, viz. in the township of Egbrough.

[The case then set out a notice, dated April 27th, 1836, from the defendant to the undertakers, calling upon them within twenty days to cleanse and scour the Egbrough portion of the drain; and on their declining, his application to two justices, and their order (under section 86) enabling him to do so].

Having obtained this order, the defendant proceeded

to cleanse the whole of the drain lying north of the canal within the township of Egbrough, including both the ancient portion of the Fleet Drain and the new connecting drains made by the undertakers, at an expense of 23*l.* 9*s.*; and on the 27th of October, 1836, he caused the undertakers to be served with a further notice thereof, (also set out in the case), and of his intention to make application to the justices at a special sessions in the following November, to ascertain the reasonable expenses incurred in such cleansing, &c. The justices, on his application, made a further order upon the undertakers for the payment of the sum expended by the defendant, together with the expenses of the application. The several amounts mentioned in such last-mentioned order were subsequently levied upon the undertakers by a distress-warrant, obtained by or on the behalf of the defendant, together with the costs of distress, amounting altogether to 26*l.* 10*s.* This amount was paid by the undertakers to the defendant, under a protest, and notice that an action would be brought to recover back the amount; and accordingly the present action was commenced. [Here followed an agreement to waive questions of form as to the action, proceedings, orders, and warrant of distress, &c.; and that the foregoing facts should be admitted, and a case stated (under 6 & 4 Will. 4, c. 42, s. 25) for the opinion of the Court upon the construction of the act 1 Geo. 4, c. xxxix; to any part of which, as well as to the previous acts of 10 & 11 Will. 3, c. 19, and 14 Geo. 3, c. xcvi., relating to the said navigation, and the before-mentioned inclosure act, 12 Geo. 3, c. xxxviii, either party was to be at liberty to refer in the argument.]

The question to be decided is,—whether the undertakers are liable to pay the money so expended as aforesaid, or any part thereof; or to cleanse or scour out such parts of the said drain as are referred to in the said notice of the 27th of April, 1836, or any and what part thereof.

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Wightman, (*Atcherley*, Serjt., with him), for the plaintiff (*a*).—The question turns upon the 86th section, without which there would be no obligation on the undertakers to cleanse these or any drains at all, if they had only substituted others for the old Fleet Drain. This section applies only to such drains as are incidental to carrying off water from the canal, and not to the ancient drains; it contemplates a different state of things than existed before the act passed. Prior to the formation of this Company, the Fleet Drain was repaired solely by the township of Whitley; the fact of the substituted drain being now in Egbrough instead of Whitley does not affect the question. It is a provision by act of Parliament; and if Whitley was bound to repair by such provision, that liability will still continue. The 85th section provides only that they shall make a drain on each side, in lieu of that part of the Fleet Drain to be destroyed. Suppose it had stopped there, would the township have been relieved and the undertakers saddled with it? Whoever was liable before would remain so still. [*Tindal*, C. J.—The words are large enough to charge the undertakers, if others are exempt.] These drains were originally made for the benefit of the district, which has that benefit now to a greater extent. The legislature jealously watched the canal as to draining lands, and all it did by section 85 was, to make drains somewhat deeper. Then, section 86 does something more; the effect of that is—the new canal might perhaps obstruct the passage of water, and, therefore, they were obliged, without reference to the two substituted drains, to make such arches &c., as might carry it off. [*Maule*, J.—Suppose the Company did not make the parallel drains, what remedy have you?] *Mandamus*; they can be compelled to make a substituted drain. [*Maule*, J.—Then, on the south they are to make a sluice or tide-

(*a*) Before *Tindal*, C. J., *Bosanquet*, *Coltman*, and *Maule*, Js.

gate and watering places, who is to repair them?]. That is a new work entirely, this only in substitution. If they have created additional impediments, they are bound to make drains sufficient for the purpose, because they introduce them, but not otherwise. [*Tindal*, C. J.—Suppose a man liable *ratione tenuræ* to repair a road, and an act of Parliament gives a substituted road, does it carry the liability *ratione tenuræ* to the substituted road without express words?] The liability is hardly that of an individual liable *ratione tenuræ* but the effect of an inclosure act. The Company have power to make the canal in a place where the old drain happened to be: the act may possibly give them the *power* of maintaining the drain, but did not necessarily contemplate their doing so. There are no words in section 85 to alter this view, and the 86th is applicable to another set altogether, that is, to drains made necessary by their own works. Whatever liability was on the landowners, therefore, still exists, or, at all events, is not thrown on the Company.

Watson, contrà.—The Company, under this act, are to make sufficient drains north and south of the canal, and, at all events, to make incidental drains, and to keep all in repair. Before the Inclosure Act, this was an old drain terminating at the river Went, far from its present termination. Then it was provided by that act, that the townships through which it passed were to repair it; that is, Whitley was bound to repair it, while Egbrough had the full benefit of it without any expense; and it is a strong fact, that the Fleet Drain formed the boundary of the two townships. When this act passed the drain was moved into Egbrough, and yet, according to the argument on the other side, Whitley is still compellable to repair a drain locally situated out of its township, and might be indicted for not doing so. This is a private undertaking, and the legisla-

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ture would never contemplate such a shifting of the burden. The Company are allowed to make a canal for their own benefit, and the act, as their deed would be, is to be construed strongly against them. Section 1 gives the power to take the Fleet Drain; referring to the preamble, it contemplates, not only making, but maintaining cuts, canals, and drains. Then, by section 32, not only the ground of the canal, but all that soil on which the drains are, is vested in the undertakers, who may go on other persons' lands for repairing and depositing; that power would otherwise have been given to the inhabitants of Whitley. Then comes section 85, which, coupled with the 86th, means this—You are making a canal requiring drainage, you shall make such drains as are necessary for the lands, that is, two at all events by the side of the canal, and all such others as shall fully answer the purpose. And this is conclusive, when you look at the clause as to magistrates (section 86), where the words are, "make, cleanse, or maintain." Upon whom is the obligation? Not on Egbrough, it had it not before; nor is it within the words of the act to throw the double expense upon Whitley. The principle is to be found in many cases, that when undertakers make substituted works for their own benefit, they cannot cast the burthen of repairing upon others. In *Rex* v. *The Inhabitants of Kent* (*a*), Lord *Ellenborough*, C. J., says, "The statute gives power to the Company to take or alter the old highway for their own purposes, upon condition of leaving another passage as convenient in its room; and if they do not perform the condition, they are not entitled to do the act. It is a continuing condition; and when the Company thought proper, for their own benefit, to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the

(*a*) 13 East, 220.

ford, they were bound to give another passage over the bridge, and to keep it for the public." [*Maule*, J.—There was a similar obligation cast on the Thames and Isis Navigation Company (*a*)]. That was also a substitution. *Rex* v. *The Inhabitants of the Parts of Lindsey* (*b*), and *Rex* v. *Kerrison* (*c*), were decided on the same principle. The words of the 86th section are quite sufficient to embrace both classes, and must be held to apply to the substituted drains.

Wightman, in reply.—The liability of the Company to make drains, sufficient to carry off all the water impounded by the canal, is not disputed; but wherever the legislature intended to impose on the undertakers the duty of repairing, they have expressly mentioned it, as in section 84. The 85th simply provides for making drains in lieu of the old Fleet Drain. Then the 86th applies to cases of difficulty, which may be occasioned by making the canal; that is, it contemplates new works. Nor is the authority of the cases disputed; but they do not apply. *Rex* v. *The Inhabitants of the Parts of Lindsey* (*b*) is a case precisely within the 86th section of this act—of a new work, and the Company bound to repair it. *Rex* v. *The Inhabitants of Kent* (*d*) only shews that, if they make an alteration, they are bound to leave it as convenient as before. Here it is not suggested that it is not so. The same observation applies to *Rex* v. *Kerrison* (*c*). This is a mere positive direction, that in lieu of the old drain you shall make a new one; and there is no more liability than if the legislature had said, instead of a crooked drain you shall make it straight.

TINDAL, C. J.—This is a case not without difficulty; but

(*a*) *Regina* v. *The Commissioners of the Thames and Isis Navigation*, 5 Ad. & Ell. 804; 8 Ad. & Ell. 901.
(*b*) 14 East, 317.
(*c*) 3 M. & S. 526.
(*d*) 13 East, 220.

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according to the best construction I can put upon it, I am of opinion that it falls within, and is to be governed by the 86th section of the 1 Geo. 4, c. xxxix.; that is, that the cuts or drains parallel to the canal, which have been substituted for such part of the Fleet Drain as was used by the undertakers of the Aire and Calder navigation, are such as *they* are bound to repair; and that the application to the magistrates, in consequence of their failing to do so, was properly made.

The 1st section of the act gives power to the undertakers, "to make and maintain a cut or canal, with cuts and branches, and to make proper drains on the sides thereof, as a substitute for the then present drain called the Fleet Drain, intended to be used as part of the line of the cut or canal, and for that purpose to enter lands;" that clearly gives them power and authority to use the old Fleet Drain, instead of cutting a new canal, and to substitute for it two parallel drains: and very large powers are given to the undertakers to enter on the lands of all persons adjoining, not only to originally make, but also to cleanse and maintain the works. Then comes section 85, containing a more specific provision. It "*requires* the undertakers, at their own cost, to make, or cause to be made, a drain on each side of, and parallel with, the said canal." By this section, therefore, it is no longer left a matter of power and authority, but they are *compelled* to make such drains. Then follows section 86, which says "the said undertakers shall, and they are hereby required, at their own costs, to make all such arches, tunnels, culverts, drains, or other passages, over, under, by the side of, or into the said canal, and the trenches, streams, and water-courses communicating therewith, and the towing-paths on the sides thereof respectively, of such depth, breadth, and dimensions, as shall be sufficient at all times to convey the water clear from the lands adjoining or lying near to the said canal, without obstruct-

ing or impounding the same; and likewise to make such back-drain or drains, as may be necessary and sufficient to carry away any water which may ooze or pass through any of the banks of the said canal, to the prejudice of any of the lands or grounds contiguous or near thereto; and that all such arches, tunnels, culverts, drains, back-drains, and other passages, shall from time to time be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said undertakers." The question is, whether those general words refer to the specific works mentioned in section 85, so as to compel the undertakers to keep them in repair as well as make them.—I am of opinion that the words are quite large enough, and that, if the sections are to be read continuously, and as though there was no division, then the 86th section would comprehend the works of the same description mentioned in the 85th.

Then, if the words are large enough for this interpretation, is there sufficient to shew that the legislature so intended them? First, let us see by whom the old Fleet Drain was to be repaired and cleansed, previous to the 1 Geo. 4, c. xxxix. By the 12 Geo. 3, c. xxxviii., it was declared to be in the township of Whitley; and the inhabitants of each township being required, by that act, to repair the public drains in it, Whitley, until the passing of 1 Geo. 4, c. xxxix., was bound to repair. But, by that act, new drains were to be made, which would no longer be in the township of Whitley, but in Egbrough; the land of which (by section 32) was made the property of the undertakers. What authority is there for saying that the liability shall still subsist against Whitley, when the drain is no longer in that township? The compulsory powers of the act had removed it from those who were formerly liable; and the question is, whether it was not the intention of the legislature that the liability should fall upon

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those undertakers. Cases have been cited to shew the opinion entertained by courts of justice under similar circumstances. *Rex* v. *The Inhabitants of Kent* (*a*) is very strongly in point, and furnishes a key to unlocking the intention of the legislature as to this act. There the Medway Navigation Company were empowered under an act, (16 & 17 Car. 2, c. xi.), to make the river navigable, and to take tolls, and "to amend or alter such bridges or highways as might hinder the passage or navigation, *leaving them* or others as convenient in their room," &c.; and they having, forty years ago, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, were held bound to keep such bridge in repair, as under a continuing condition to preserve the new passage, in lieu of the old one, which they had destroyed for their own benefit. So here, the power of substituting the new drains for the old was conferred upon the undertakers of this navigation for their own benefit; and, therefore, the maxim of law will apply, "*qui sentit commodum, sentire debet et onus.*" I am of opinion, therefore, that our judgment must be for the defendant.

BOSANQUET, J.—I also am of opinion, that, according to the true construction of this act (1 Geo. 4, c. xxxix.), the undertakers of the Aire and Calder navigation are bound to cleanse and repair the substituted drains; and that the words of sections 85 and 86, taken together, are sufficient to bring them under the jurisdiction of the magistrates, and to justify their order. The question is, whether the legislature contemplated their being liable not only to make drains in substitution of the former, but also to repair them. The 1st section gives the Company authority

(*a*) 13 East, 220.

to make the drains in substitution of the old one. Then, the soil of that and other drains is expressly vested in the navigation by section 32; therefore the land is their own, and they clearly have full *power* to cleanse the drains. Then are they *required* to do so? This was a drain which they destroyed for their own convenience: that being done, and a new one substituted, the case falls within the principle of the cases cited, especially of *Rex* v. *The Inhabitants of Kent* (*a*), where Lord *Ellenborough*, C. J., held the words, obliging the Medway navigation to leave another convenient passage in lieu of that destroyed by them for their own purposes, as a continuing condition binding them to keep the substituted way in repair. If it were not so also in this case, there would be strange anomalies. The whole of the old Fleet Drain, before the passing of the act, was subject to be repaired by the township of Whitley; for this, two new lines of drain were substituted, one in Whitley, the other in Egbrough, the township on the north side, which was never liable to maintain any part of the old drain. Then, either the inhabitants of Egbrough must repair entirely, or the inhabitants of Whitley must be bound to contribute to the repair of a drain which is not in their own township; and I cannot think that was intended.

Then, are the words at the end of section 86 sufficiently large to include these substituted drains? The 85th section requires them to be made; and then, in section 86, a provision immediately follows for making *such* drains, &c., of sufficient dimensions to convey the water clear from the lands adjoining to the canal, and that all *such* drains &c. shall be kept in repair by the undertakers. It cannot be denied, that the words will bear the construction; and, therefore, it appears to me, that, on the principles of law, the magistrates had power to make such an order.

(*a*) 13 East, 220.

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COLTMAN, J.—I am of the same opinion. This act was intended for the benefit of a particular class of adventurers; and is to be construed most strongly to protect the public; upon the principle, that, being in the nature of a private contract, *verba fortiùs accipiantur contrà proferentem.* It appears to me, the most natural construction would be the confined one proposed by Mr. *Wightman;* but that, in order to give a liberal interpretation to meet the justice of the case, and the intention of the legislature, which cautiously provides against mischief to landowners &c., we are well warranted in adopting the extended construction. I think, therefore, that the compulsory words in section 86 extend to the works mentioned in the 85th, and that the Company will be liable at all future times to repair these drains.

MAULE, J.—I am also of opinion, that the undertakers of this navigation are bound to cleanse these drains. Before the passing of this act (1 Geo. 4, c. xxxix.), there was an ancient drain, which in some degree drained the lands in question, for which a substituted drain has been made twelve inches deeper. It appears, that the ancient drain terminated in the river Went, which is at a higher level than the Dun; if, therefore, the water were penned back by the insufficiency of the drain, it would be quite impossible for it in a drain twelve inches deeper to fall into the same place as before. But besides this, the Company are *at all times* to carry off the water clear from the lands adjoining without obstruction; that unquestionably means, that the landowners shall have a better and more effectual drainage than before; *that* the townships were not bound to provide, but only to cleanse the old drain, and they are not now to be compelled, by the act of the undertakers, to have the burden cast upon them of finding a better drainage for the country than before, unless

expressly so provided by the act. The question then is not so much whether the townships are liable, as whether the Company is so.

Section 1, in unambiguous language, empowers them to make the substituted drains; and, for that purpose and the purpose of maintaining them, to enter upon the lands of any persons, &c. These works could belong to nobody, but by act of Parliament; and when a power is given to a Company for the benefit of others, it is not left to their option whether they will do it or not, but power is generally given to the neighbour to enforce it. The 32nd section is very material; it vests in the trustees the soil of the canal, drains, &c. Then comes the 85th, *requiring* them to make the drains, which before they were only *authorized* to make. That section, though not containing express mention of repairing the drains so made, evidently intends that they shall be kept in an efficient state. Then section 86, which requires the undertakers, at their own costs, to make such arches, drains, &c., of such depth, breadth, and dimensions, as should be sufficient at all times to convey the water clear from the lands adjoining to the canal, enacts, "that all *such* arches, drains, &c., shall from time to time be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said undertakers." In the Parliamentary Roll the 85th and 86th sections would not be distinguishable; therefore the word "such" may comprehend as well the drains mentioned in the 85th as those in the 86th: and, it being the probable intention of the legislature and the justice of the case, that the undertakers should do so, such a reasonable rule of construction ought to be put upon the words of this act, as is by Lord *Tenterden*, C. J., in *The Stourbridge Canal Company* v. *Wheeley* (*a*),—that "any ambi-

(*a*) 2 B. & Ad. 792.

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guity in the terms of a contract must operate against the adventurers and in favour of the public; and the plaintiffs can claim nothing which is not *clearly* given to them by the act." This view of the case is confirmed by the previous decisions in *The Hull Dock Company* v. *La March* (*a*) and *The Leeds and Liverpool Canal Company* v. *Hustler* (*b*). By this rule the undertakers of this navigation are bound to repair the drains in question, and therefore these proceedings were lawfully instituted.

Judgment for the defendant (*c*).

(*a*) 8 B. & C. 51; 2 M. & R. 107.
(*b*) 1 B. & C. 424; 2 D. & R. 556.
(*c*) See the judgment of Lord *Cottenham*, C., in *Webb* v. *The Manchester and Leeds Railway Company*, ante, Vol. 1, p. 576.

COURT OF COMMON PLEAS.

Sittings after Michaelmas Term, 1840.

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Dec. 5.

ASSUMPSIT for money had and received, and on an account stated. Plea, *non assumpsit*. The cause was tried at the sittings at Guildhall, in Trinity Term, 1837, before *Vaughan*, B., when the jury found a special verdict as follows:—

That, after the passing of certain acts of Parliament therein recited, (1 & 2 Geo. 4, c. xliv, 4 Geo. 4, c. xxxiii, 5 Geo. 4, c. xlviii, and 9 Geo. 4, c. lx), and in pursuance, and under the authority of the said acts, or some or one of them, a certain railway has been constructed, called "The Stockton and Darlington Railway," and certain branch railways therefrom, and, amongst others, a branch to Middlesborough in the port of Stockton-upon-Tees, and terminating at and upon the river Tees; and certain inclined planes on the said railway and branches,

By the Stockton and Darlington Railway Act, (1 & 2 Geo. 4, c. xliv, s. 62,) the following tonnage rates are authorized to be taken:

1. For *all coal* (amongst other things) carried upon the railway, such sum as the Company shall appoint, not exceeding 4*d.* per ton per mile.

2. For all articles, matters, and things, *for which a tonnage is hereinbefore directed to be paid*, which shall pass the inclined plane on the said railway, such sum as the Company shall appoint, not exceeding 1*s.* per ton per mile.

3. And for all coal which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees, *for the purpose of exportation*, such sum as the Company shall appoint, not exceeding ½*d.* per ton per mile.

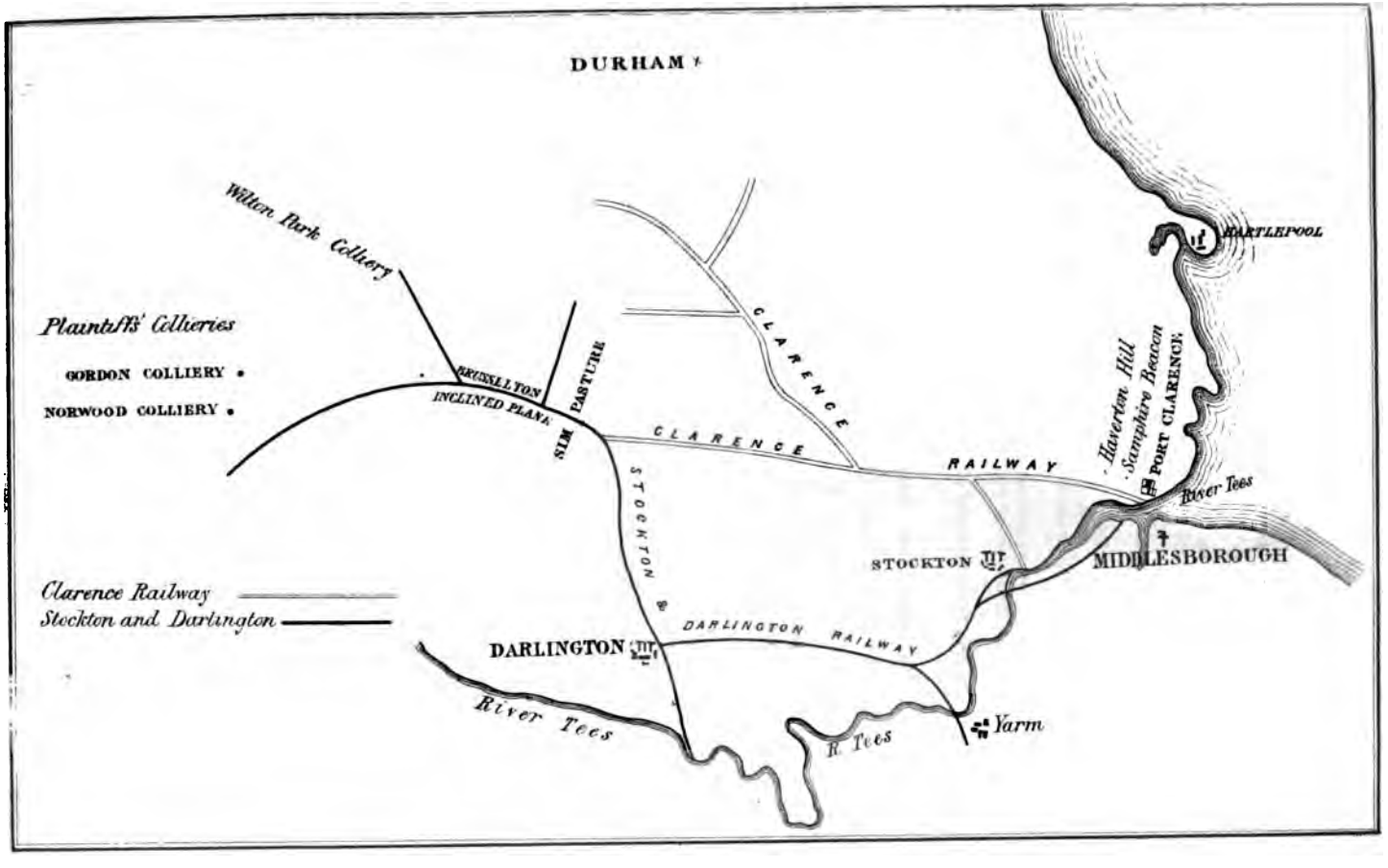
Held, that the third branch excepts coal for exportation out of the operation of the first branch, and imposes the duty of ½*d.* instead of 4*d.* per ton thereon.

And that "exportation" includes a carrying out of the port of Stockton to any other port or place in the United Kingdom, as well as to foreign parts.

Held, also, that coal so carried along the railway for exportation is liable to the payment of toll for the inclined plane.

And that, under the circumstances, the *port* of S. included places within the legal port, but at some distance from the town, though the act (in section 1) had spoken of "the *port* and *town* of S."

Where the language of an act of Parliament obtained by a Company, imposing a rate or toll upon the public, is ambiguous, that construction is to be adopted, which is more favourable to the interest of the public, and against that of the Company.


DURHAM
Wilton Park Colliery
Plaintiffs' Collieries
GORDON COLLIERY
NORWOOD COLLIERY
BRUSSELTON INCLINED PLANE
SIM PASTURE
CLARENCE
CLARENCE RAILWAY
STOCKTON & DARLINGTON RAILWAY
HARTLEPOOL
Haverton Hill
Samphire Beacon
PORT CLARENCE
River Tees
STOCKTON
MIDDLESBOROUGH
DARLINGTON
Clarence Railway
Stockton and Darlington
River Tees
R. Tees
Yarm

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and particularly a certain double inclined plane at a place called Brusselton, and called "The Brusselton Inclined Plane," which double inclined plane consists of two inclined planes meeting at a point, and declining therefrom, the one to the east and the other to the west; which said railway, branches, and inclined planes are the sole property of the defendants. That in pursuance and under the authority of subsequent acts of Parliament in that case made and provided, some or one of them, a certain other railway called "The Clarence Railway," and certain branches therefrom belonging to another Company called "The Company of the Proprietors of the Clarence Railway," have been made, subsequently to the construction of the first mentioned railway and the said branches thereof; which Clarence railway joins the Stockton and Darlington railway at a place called Simpasture, and extends from thence to a place called Haverton Hill, ~~and~~ thence by a branch to a place called Samphire Beacon, and thence to a place called Port Clarence upon the river Tees, and within the port of Stockton-upon-Tees. [*See the Plan.*]

That the defendants have from time to time directed and appointed the several rates, tolls, inclined-plane dues and duties to be charged by them for the tonnage of all goods, wares, merchandize, and other things carried or conveyed along the said railway and branches and inclined planes of the defendants. And that long before and on July 1st, 1836, and from thence until and after November 1st, 1836, an account or list of the several rates of tonnage, inclined-plane dues and duties, which the defendants had before then directed and appointed as aforesaid, was affixed and stuck up upon the several toll-houses on the said railway of the defendants, and in other places, as required by the said acts of Parliament.

That on divers days and times between the said July 1st, 1836, and November 1st, 1836, the plaintiff sent, for the purpose of the same being shipped and con-

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veyed as hereinafter mentioned, several parcels of coals amounting in the whole to 10,000 tons, from a certain colliery called the Gordon Colliery, situate at a distance of eight miles from Simpasture; and also several parcels of coals amounting in the whole to 6160 tons, from a certain other colliery called the Norwood Colliery, situate at a distance of nine miles from Simpasture aforesaid, along the defendants' railway, unto, along, and over the said Brusselton Inclined Plane, and from thence along the defendants' railway to Simpasture, and from Simpasture unto and along the said Clarence Railway and branches thereof to Port Clarence; and that at the times the several parcels of coals were so sent and carried, the plaintiff gave notice to the defendants, that the whole of the said coals were for exportation. And that the plaintiff, in pursuance of the purpose aforesaid, shipped the said several and respective parcels of coals on board of vessels lying at Port Clarence, within the port of Stockton-upon-Tees, for the port of London, in that part of the United Kingdom called England, for consumption there; and that the said coals, being so shipped as aforesaid, were afterwards, and before the several demands and payments hereinafter mentioned, respectively carried and conveyed by the said vessels from Port Clarence to London for consumption there.

That on divers days and times between the said July 1st, 1836, and November 1st, 1836, the plaintiff sent, for the purpose of the same being shipped and conveyed as hereinafter mentioned, several parcels of coals amounting in the whole to 400 tons, from the Gordon Colliery, and also several parcels of coals amounting in the whole to 400 tons, from the Norwood Colliery, along the defendants' railway, into, along, and over the said Brusselton Inclined Plane, and from thence along the defendants' railway, and the Middlesborough branch thereof, to Middlesborough; and that at the times the several last-mentioned parcels of coals were so sent and carried, the plaintiff gave notice to the de-

fendants that the whole of the said last-mentioned coals were for exportation. That the plaintiff, in pursuance of the purpose aforesaid, shipped the said several last-mentioned parcels of coals on board of vessels lying at Middlesborough for the port of London, for consumption there; and that the said coals, being so shipped, were afterwards, and before the several demands and payments hereinafter mentioned, respectively carried and conveyed by those vessels from Middlesborough to London, for consumption there.

That, for and in respect of the coals so conveyed to and shipped at Port Clarence, in addition to a charge for haulage not in dispute between the parties, the defendants demanded and required the plaintiff to pay tonnage, for the transit of such coals along the railway of the defendants to Simpasture, at and after the rate of $1\frac{1}{4}d.$ per ton per mile, (being the usual tonnage rate charged by the defendants for coals carried from Simpasture along the defendants' railway and the branches thereof, for consumption within the limits of the port of Stockton-upon-Tees), in the whole amounting to 987*l.* 11*s.* 8*d.*; and also the additional duty or sum of 6*d.* per ton upon the same coals, for and in respect of the transit or passage thereof over the Brusselton Inclined Plane, in the whole amounting to £404: and that, for and in respect of the coals so conveyed to and shipped at Middlesborough, in addition to a charge for haulage not in dispute between the parties, the defendants demanded and required the plaintiff to pay tonnage for the transit of such coals along the said railway of the defendants to Middlesborough, at and after the rate of $\frac{1}{2}d.$ per ton per mile; and also the additional duty or sum of 6*d.* per ton upon such coals, for and in respect of the transit or passage thereof over the said Brusselton Inclined Plane, which additional duty amounts in the whole to the sum of £20; all such charges and demands for the tonnage and inclined-plane dues and duties so made and demanded, being respectively according to the rates, tolls,

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inclined-plane dues and duties so directed, appointed, affixed, and stuck up as aforesaid.

That after the said demands, the said several sums of 987*l.* 11*s.* 8*d.*, £404, and £20, were respectively paid by the plaintiff to the defendants, and that the same sums were, and each of them was, so paid by the plaintiff to avoid a distress, and under protest, and after the sum of 252*l.* 3*s.* 4*d.* (being at the rate of ½*d.* per ton per mile, for the tonnage of the several quantities of coals so carried and conveyed by the defendants to Simpasture, and thence carried along the Clarence Railway and branches thereof to Port Clarence, and there shipped as aforesaid) had been tendered by the plaintiff, and refused by the defendants; and that the said several sums were so paid by the plaintiff under an agreement with the defendants, that the plaintiff should be entitled to recover back the whole or any part of the sums so paid by him to the defendants by the within-mentioned suit, if the same were not legally due when so paid.

That Middlesborough and Port Clarence are on opposite banks of the river Tees, at the distance of one mile from each other, and nearly equally distant from the mouth of the river; and that the distance from Simpasture to Stockton, by the defendants' railway, is seventeen miles and a quarter, and from Stockton to Middlesborough, by the defendants' railway, four miles, and from Simpasture to Middlesborough, by the defendants' railway (avoiding Stockton), twenty miles and a half; and that the distance from Simpasture to Port Clarence, by the Clarence Railway, is sixteen miles.

That the only place for the shipment of coals carried along the defendants' railway, as constructed under their first act, was Stockton-upon-Tees, within the port of Stockton-upon-Tees, and that at the times when the several coals were so carried and conveyed, the only places for the shipment of coals carried down the defendants' railway

and the branches thereof from Simpasture, below the junction of the Clarence Railway and the defendants' railway, were Stockton-upon-Tees and Middlesborough.

That until the construction of the defendants' railway, coals were not shipped for sale in the port of Stockton-upon-Tees; that the defendants have no property in or control over the Clarence Railway, or Port Clarence; and that Port Clarence and all the staiths, buildings, and places for the shipment of coals there, and all the lands immediately surrounding the same, are the sole property of the Company of proprietors of the Clarence Railway: that, ever since the construction of the Clarence Railway, coals gotten from various other pits, and conveyed upon the Clarence Railway, and not upon any part of the defendants' railway, have been and are shipped at Port Clarence; and that, about a quarter of a mile from Port Clarence, on the opposite side of the river, is a place called Cargo Fleet, for the landing of coals and other merchandize.

That, before the passing of the act (1 & 2 Geo. 4, c. xliv.), there was no railway from which coals could be shipped at the port of Stockton-upon-Tees, or along which coals could be carried for exportation there; and that Hartlepool and Seaham, where there are harbours and staiths and places for the shipment of coal, made and erected subsequently to the construction of the defendants' railway and branches, are respectively within the port of Stockton, (Hartlepool being twelve miles, and Seaham twenty-two miles from the town of Stockton); but that coals passing along the defendants' railway and branches, or any part thereof respectively, are not shipped at either of those places.

And upon the whole matters aforesaid found with respect to the said issue joined between the parties aforesaid, the jurors aforesaid are altogether ignorant how far, or for whom, the said issue ought to be found; and thereupon they pray the advice of the Court of our Lady the Queen of the Common Pleas at Westminster. And if

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upon the whole matters aforesaid it shall seem to the said Court, that the said defendants were not, during all the time aforesaid, legally entitled to charge for the tonnage of the coals carried and conveyed along the railway of the defendants to Simpasture, and thence along the Clarence Railway to Port Clarence within the port of Stockton, and there shipped for and conveyed to the port of London for consumption there, more than after the rate of one halfpenny per ton per mile, then the jurors say that the plaintiff is entitled to recover back, and receive from the defendants, the sum of 705*l.* 8*s.* 4*d.*, being after the rate of 1¼*d.* per ton per mile by the defendants overcharged for and in respect of the tonnage of the coals so carried and conveyed for the purpose of being shipped as last aforesaid; but if it shall seem to the Court that the defendants were, during all the time aforesaid, legally entitled to charge more than one halfpenny per ton per mile, for and in respect of the tonnage of such coals, then the jurors say that the plaintiff is not entitled to recover back or receive any thing as last aforesaid.

And if it shall seem to the Court that the defendants were not, during all the time aforesaid, legally entitled to charge upon the coals carried and conveyed along the railway of the defendants to Simpasture, and thence along the Clarence Railway to Port Clarence within the port of Stockton, and there shipped for and conveyed to the port of London for consumption there, an additional charge of 6*d.* per ton, over and above the tonnage, for every ton of such coals passing the said Brusselton Inclined Plane, then the plaintiff is entitled to recover back and receive from the defendants the further sum of £404, in respect of such additional charge for the passage of the coals over the said inclined plane, for the purpose of being shipped as last aforesaid; but if it shall seem to the Court that the defendants were, during all the time aforesaid, legally entitled to make the last-mentioned additional charge of 6*d.* per ton

for such coals passing the said Brusselton Inclined Plane, for the purpose of being shipped as last aforesaid, then the plaintiff is not entitled to recover back or receive any thing from the defendants in respect of such additional charge.

And that, if it shall seem to the said Court that the defendants were not, during all the time aforesaid, legally entitled to charge upon the coals, carried and conveyed by the defendants along the defendants' railway, and the branches thereof, to Middlesborough aforesaid, and there shipped for and conveyed to the port of London for consumption there, an additional charge of 6*d.* per ton, over and above the tonnage, for every ton of such coals passing the Brusselton Inclined Plane, for the purpose of being shipped as last aforesaid, then the plaintiff is entitled to recover back and receive from the defendants the further sum of £20, in respect of such additional charge for the passage of the coals over the said inclined plane, for the purpose of being shipped as last aforesaid; but if it shall seem to the Court that the defendants were, during all the time aforesaid, legally entitled to make the additional charge of 6*d.* per ton for such coals passing the Brusselton Inclined Plane, for the purpose of being shipped as last aforesaid, then the plaintiff is not entitled to recover back or receive any thing from the defendants in respect of such additional charge.

And if upon the whole matters aforesaid it shall seem to the Court, that the issue within joined between the parties, or any part thereof, ought to be found for the plaintiff, then the jurors aforesaid, &c. do find the same, and assess the damages accordingly for the plaintiff, in such manner as the Court shall think the same ought to be found upon the whole of the matters aforesaid. And if it shall seem to the Court that the issue within joined between the parties, or any part thereof, ought to be found for the defendants, then the jurors, &c., do find the same accordingly for the defendants, in such manner as the Court shall

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think the same ought to be found upon the whole of the matters aforesaid (*a*).

(*a*) By the 1 & 2 Geo. 4, c. xliv., s. 62, it is enacted, that, in consideration of the great charge and expense, which the said Company of proprietors must incur and sustain in making and maintaining the said railroads, or tram-roads, and other the works hereby authorized to be made and maintained, it shall and may be lawful for the said Company of proprietors, from time to time, and at all times hereafter, to ask, demand, take, recover, and receive, to and for the use and benefit of the said Company of proprietors, for the tonnage of all goods, wares, and merchandizes, and other things which shall be carried or conveyed upon the said railroads or tram-roads, or upon any part thereof, the rates, tolls, and duties hereinafter mentioned, that is to say—

1. For all limestone, materials for the repair of turnpike roads or highways, and all dung, compost, and all sorts of manure, except lime, which shall be carried or conveyed upon the said railroads or tram-roads, such sum as the said Company of proprietors shall from time to time direct or appoint, not exceeding the sum of 4*d.* per ton per mile.

2. For *all coal*, coke, culm, cinders, stone, marl, sand, lime, clay, iron stone, and other minerals, building stone, pitching and paving stone, bricks, tiles, slates, and all gross and unmanufactured articles and building materials, such sum as the said Company of proprietors shall from to time direct and appoint, not exceeding the sum of 4*d.* per ton per mile.

3. For all lead in pigs or sheets, bar iron, earthenware, timber staves and deals, and all other goods, commodities, wares, and merchandizes, such sum as the said Company of proprietors shall from time to time direct and appoint, not exceeding the sum of 6*d.* per ton per mile.

4. For all the articles, matters, and things, *for which a tonnage is hereinbefore directed to be paid*, which shall pass the inclined planes upon the said railroads or tram-roads, such sums as the said Company of proprietors shall appoint, not exceeding the sum of 1*s.* per ton.

5. And *for all coal* which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees aforesaid, *for the purposes of exportation*, such sums as the said Company of proprietors shall appoint, not exceeding the sum of one halfpenny per ton per mile."

Sect. 70. "And for better ascertaining, and more easily collecting, the said rates, tolls, and duties, be it further enacted, that the owner or owners, or person or persons, having the care of any waggon or other carriage passing upon the said railroads or tram-roads, or any part thereof, shall give an exact and true account in writing, signed by him or them, to the collectors of the said rates and tolls, at the place or places where they shall attend for that purpose,

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Sir *T. Wilde*, Solicitor-General, (*Stephen*, Serjt., *Wightman*, and *Fitzherbert* with him), for the plaintiff (*a*).—First, the defendants are not entitled to charge for the tonnage of coals, carried along their railway and shipped

of what quantity of goods or other things as aforesaid shall be in such waggon or other carriage, and with respect to such waggon or other carriage, from whence brought, and *where the same are intended to be unloaded or left;* and in case any person shall neglect or refuse to give such account, or to produce his bill of lading to any collector demanding the same, or shall give a false account, or shall deliver any part of his lading or goods at any other place than what is or are mentioned in such account, with an intent to avoid the payment of the said rates, tolls, and duties, or any part of them, he shall forfeit and pay any sum not exceeding 10*s.* for every ton of goods and other things, and so in proportion for any less quantity than a ton which shall be in such waggon or other conveyance, of which such account shall be so refused to be given, or which shall be fraudulently delivered out as aforesaid, as the case shall happen to be, over and above the respective rates, tolls, and duties directed to be paid for the same by virtue hereof."

By the 4 Geo. 4, c. xxxiii., s. 21, reciting that "Whereas by the said recited act (1 & 2 Geo. 4, c. xliv.) the said Company of proprietors were authorized and empowered, from time to time, and at all times thereafter, to ask, demand, sue for, recover, and receive for the tonnage of *all articles, matters, and things*, for which a tonnage duty is therein directed to be paid, which should pass the inclined planes upon the said railroads or tram-roads, such sum as the said Company of proprietors should appoint, not exceeding the sum of 1*s.* per ton. And whereas, at the time of the passing of the said recited act, it was understood and considered that *one inclined plane only would be necessary* upon the said railroads or tram-roads thereby authorized to be made; but inasmuch as by reason of the deviations and alterations hereby authorized to be made, and by which it appears the length of the said railroads or tram-roads will be shortened three miles or thereabouts, a greater number of inclined planes will be requisite; it is enacted, that it shall and may be lawful to and for the said Company of proprietors, from time to time, and at all times hereafter, to ask, demand, take, recover, and receive, to and for the use and benefit of the said Company of proprietors, *for all articles, matters, and things*, which shall pass one or more of the inclined planes upon the said railroads or tram-roads, such sum as the said Company of proprietors

(*a*) November 18th, before *Tindal*, C. J., *Bosanquet*, *Coltman*, and *Maule*, Js.

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at Port Clarence for the port of London, more than after the rate of one halfpenny per ton per mile.

The 62nd section of the 1 & 2 Geo. 4, c. xliv., which gives remuneration to the Company, contains five heads of charge, under the second of which coal is mentioned generally to be subject to a charge of 4*d.* per ton per mile; this does not seem to apply to export coal, which, by the fifth head, is not to be charged more than one halfpenny. The plaintiff contends, that coals put on board at Stockton for London are *export* coals within the meaning of the statute, and that the word is not to be used in the limited and narrow sense—"to foreign parts," or "beyond the seas." In construing this word regard must be had to the subject-matter, which shews that it is as well satisfied by sending from one port in the United Kingdom to another, as to a foreign one. It is evident that the legislature meant to charge less for coals intended for exportation, in any sense of the word, than for those to be used in the district; otherwise, if a difference to such an extent was to be made as to their destination, that would have led to the introduction of clauses to check any fraud; but there are no such provisions—not even a declaration of destination is required; although, by section 70, (inasmuch as the defendants are entitled to a mileage for carriage), an account is required, stating whence they come, and where they are to be unloaded or left. Seeing, therefore, that the attention of the Company has been directed to this account, it could not be expected that they would omit some provision, for a declaration to be added, whether or not they were intended for foreign parts. No object can be stated

shall appoint, not exceeding the like rate or sum of 1*s.* per ton, for and in respect of each of the said inclined planes, over and above, and in addition to the rates, tolls, and duties by the said recited act and this act imposed or authorized to be taken and received for goods, wares, merchandizes, and other things, which shall be carried or conveyed upon the said railroads or tram-roads, or any part thereof."

for their wishing to charge less for coals sent across the seas than to London; there is a duty not a bounty on the foreign exportation of coal. The word, therefore, must be construed in favour of the public, and against the Company, who have no right to use words bearing two widely different senses, and then claim that sense which gives them the power of imposing the greater burthen.

There are several acts where the words *export* and *import* refer to a transfer of goods *from one port of the United Kingdom to another*. In the 6 & 7 Will. 3, c. 18, ss. 14, 15 & 24, the word "import" is so used; so are both words in the 9 & 10 Will. 3, c. 13, ss. 4, 5, 6 & 12, and in the 7 Anne, c. 5, ss. 5, 6, 7 & 22; and see also the 5 Geo. 1, c. 9, s. 1; the 50 Geo. 3, c. 110, ss. 1 & 4, and the 6 Geo. 4, c. 107, s. 122, where they are coupled with "inward, outward, or coastwise." So in 3 & 4 Will. 4, c. 52, s. 105, which is a re-enactment of the last. The 5 Geo. 1, c. 9, s. 1, and 5 Geo. 3, c. 35, are to the same purport. In all these acts, wherever a charge is imposed on the subject, the word "export" is used in conjunction with "foreign parts," or "beyond the seas," and not otherwise. This view is fortified by the Company's own construction. The Clarence Act (*a*) went contemporaneously with this through Parliament, and was passed on the same day (*b*). It contained a section (the 60th) similar to the one in question, imposing a different duty on coals "for exportation," and "for home consumption," which made it liable to the same difficulty of construction. An act was afterwards passed (10 Geo. 4, c. cvi.), for amending the former, which removed the difficulty, for by section 37 it is enacted, "that all coal, &c., which shall be shipped on board any vessel in the river Tees, and entered at the custom-house of the port of Stockton-upon-Tees, shall be deemed and taken to be for exportation under the said re-

(*a*) 9 Geo. 4, c. lxi. (*b*) 23rd May, 1838.

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cited acts and this act." The preamble of the first Clarence Act recited, that it would open a shorter communication between certain mines and the river Tees, at a more convenient port than heretofore for shipment; but if the use of that shorter communication is to subject the owners of coal to a large increase of price, the act is perfectly nugatory.

Secondly, if a shipment for and arrival in London is an *exportation*, no reason can be given for the defendants charging less for their whole line than for part; yet it is contended that the coals in question are not to be considered as exported, because they left the line of railway at Simpasture. The owners have a discretion as to unloading on all the line of railway, and there are sections in the act giving the lords of manors and others the power of making a depôt, and, therefore, of unloading at discretion throughout the line. It is the defendants' own fault if they have not taken sufficient precaution to ascertain the destination; all that would require to be stated is, whether the coals were for exportation, not where they were to be unloaded. [*Tindal*, C. J.—Is the word "shipment" found in the Stockton and Darlington act?]—In the 62nd section of the first act, the word "shipped" is used, and the verdict finds these coals were shipped for exportation at Port Clarence, and had been, in fact, conveyed to London.

Thirdly, supposing coals shipped for the port of London are "exported," the question is, whether they are liable to 6*d.* per ton, over and above the other tonnage, for passing the Brusselton Inclined Plane. Under the 62nd section of 1 & 2 Geo. 4, c. xliv., it is contended the legislature did not intend to subject exported coal to that charge; if that proposition be clear, the question will arise, whether by implication or intendment a new charge is imposed by the second act. In the second head of charges in that 62nd section, there is a charge *for all coals*, &c., not exceeding 4*d.* per ton per mile—did these words mean to include

exported coal, or were they subject to the limitation of all coal not exported? Then comes the head relating to the inclined plane—for all articles for which a toll is *hereinbefore* directed to be paid 1*s.* per ton per mile; and following that is one—for all coal which shall be shipped, &c., for the purpose of exportation, a sum not exceeding a halfpenny per ton per mile. Therefore, reading the last head in connection with the second as to all coal, the explanation is, that the first should be read—for all coal not exported 4*d.* is to be charged, for all exported one halfpenny; that the inclined-plane dues are only to be charged on the articles *hereinbefore* directed, and it is only coal not exported that is liable to those dues. When the legislature says "all coal," it means all coal not exported, which is the subject of a different provision; if not, the last head is exceptive, and the rule of construction is, that unless a section admits of no other construction, it shall not be considered as repealing or destroying another, but that both shall stand (*a*). This point is very material, for if under this act exported coal is not liable to inclined-plane dues, the question will arise, whether the second act either repeals the former, or incidentally makes the coal liable to those dues. Now the 4 Geo. 4, c. 33, s. 21, recites an unlimited right of taking tonnage for all coal, and that one inclined plane only was contemplated: that is a mis-recital in any way; it professes to recite the former section, but omits most material words of it, not only those which operate as an exception, but also all notice of the subsequent provision as to export coal paying one halfpenny per ton. The effect of this is not only to subject it to the new inclined planes contemplated by the 2nd act, but, for the first time, to the one considered necessary by the 1st act. The recital contains no language to warrant the supposition that the class of payers was not sufficient, or to bring in a new class; but the simple and natural conclusion is, that

(*a*) Hardress, 343-4.

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those persons who had been liable to pay for the one inclined plane, should now be so for the new. *Gildart* v. *Gladstone* (*a*) and *Scales* v. *Pickering* (*b*) shew, that, if the words of the statute on which reliance is placed be ambiguous, every presumption is to be made against the Company, and in favour of private property; and see also *Niblett* v. *Pottow* (*c*). If such a construction were not adopted, acts would be framed ambiguously in order to lull parties into security. If the second head is read as subject to the exception in the last, and the recital in the second act as comprising the two, all is consistent; the plaintiff is therefore entitled to judgment.

Channel, Serjt., (*Addison* and *Smythe* with him), for the defendants. With respect to the coals sent along the railway of the defendants as far as Simpasture, and afterwards by the Clarence Railway, the plaintiff says that two improper charges were made: 1st, the tonnage per mile, which exceeds one halfpenny; and, 2ndly, the charge of 2*d*. for the Brusselton Inclined Plane. As to the coals shipped at Middlesborough, the only contest is respecting the charge for the inclined plane.

The 62nd section is the important one, and if it had stopped at the three first clauses, this charge would have been clearly legal; but the plaintiff says the 5th clause is fatal; if so, it must act by way of proviso or exception. The defendants contend that it does not act as a proviso, but is cumulative; the construction which the Company may appear to have themselves put upon the act is not to bind the opinion of the Court. [*Tindal*, C. J.—Where toll is intended to be cumulative, it is generally expressed "over and above," as in the case of stamp acts.] This is not in the nature of an act taxing the public, which is always compulsory, but is to be construed as a contract, and not

(*a*) 11 East, 685. (*b*) 4 Bing. 452. (*c*) 1 B. N. C. 81.

an interference with the rights of the public, whose use of the railway is voluntary. The 4th clause of this section, which is clearly cumulative, contains no further words to indicate that intention than the 5th does, except the words "hereinbefore directed to be paid," which are merely descriptive; and it is conceded that there was no export trade for coals from Stockton, until after the passing of this act and the construction of the railway.

Secondly. There is no *exportation* here to satisfy the act of Parliament. The simple meaning of the word as given in Johnson's Dictionary is, "the act or practice of carrying out." In *Bennett* v. *Daniel* (*a*), *Parke*, J., says:—"It is a safe rule of construction to take words in their plain and ordinary sense, unless a different intention can clearly be collected from the other parts of an act of Parliament." If the word *exportation* means only sailing from a port, it need hardly have been inserted at all in the clause, for the word "shipped" would have been sufficient. In the statute 6 & 7 Will. 3, c. 18, where the word "exported" is used between the words "brought" and "carried," the section goes on—"from one port of the United Kingdom to another port." And in the Customs Acts, 6 Geo. 4, c. 107, s. 122, and 3 & 4 Will. 4, c. 52, s. 125, the term used is "*exportation coastwise or otherwise*," which seems as if it was necessary to use the word "coastwise," or it would not be included in "exportation."

But thirdly, this must be an exportation from the *port* of Stockton-upon-Tees. Port may mean a particular locality or district, or a number of places classed together for the revenue or other purposes. In the case of *The Dock Company at Kingston-upon-Hull* v. *Browne* (*b*), it was held that the act must be construed as using the term "port" in the popular, that is, the limited sense. According to a reasonable construction of the Company's

(*a*) 10 B. & C. 500. (*b*) 2 B. & Ad. 43.

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original act, it may be collected that the coals which the legislature intended to exempt from the higher toll, were only such as should be carried down the Company's railway and shipped at the terminus thereof, (as described by the act) and the grounds for forming that construction are, first, the state of things preparatory to the passing of the act; secondly, the words used in the preamble; and thirdly, the language of other clauses of the original and amended acts; and these tests may be applied: Bacon's Abridgement, "Statute," I. 5. First, coals were not shipped from Stockton-upon-Tees before the 1 & 2 Geo. 4, c. 44, and therefore no port would be contemplated except that near the terminus of the railway. Secondly, doubtful words may be explained by the preamble of a statute. Lord *Coke* says, "it is a good mean of finding out the key to the understanding thereof:" Co. Litt. 79 a. and see *Crespigny* v. *Wittenoom* (*a*), *Mason* v. *Armitage* (*b*), and *Halton* v. *Cove* (*c*). The last clause of section 62 mentions the port of Stockton-upon-Tees *aforesaid;* the only place where it is before mentioned being the preamble, and there it is alluded to as follows:—"Whereas the making of a railway *from the river Tees at or near* Stockton to Wilton Park Colliery," &c. The railway was made pursuant to a plan laid before the legislature, and that plan defined the *termini*: *Rex* v. *Pease* (*d*). In the Clarence Act, (which the defendants contend ought not to be taken to control the construction of the present act—*Brett* v. *Beales* (*e*)), the power is not granted to make a railway from the port of Stockton-upon-Tees, but from the "river Tees."

As to the charge for the inclined plane, there is nothing to shew that the fifth clause is to operate as a proviso; but

(*a*) 4 T. R. 793, (see the observations of *Buller*, J.)

(*b*) 13 Ves. 35.

(*c*) 1 B. & Ad. 558.

(*d*) 1 N. & M. 694. *Parke*, B., says, "It is clear that the Company knew the railroad would be by the side of the turnpike road."

(*e*) 1 M. & M. 421.

if it does operate at all in that way it is only as to the three first clauses. At all events the defect, if any, is cured by the 21st section of 4 Geo. 4, c. 33, which is sufficiently explicit as to the intention of the legislature being, that it should extend to all articles, matters, and things chargeable under the former act, and is, therefore, to be taken as an exposition of, or substitution for the provisions of that act.

Sir *T. Wilde*, Solicitor-General, in reply.—There is no reason why "export" should be construed so as to exclude exports coastwise; the word "exportation" is used, because otherwise coals might be shipped and unshipped for the mere purpose of evading the higher toll. There are no words to shew that the halfpenny per ton is cumulative; and if a private act is to be construed as a contract, it must be remembered that the Company prepared the terms of that contract, and ought to have been explicit. They have always themselves treated that clause, as limiting the charge to one halfpenny, in the case of goods exported coastwise which have passed altogether along their railway. With respect to the word *port*, there is no reason why the legislature should have favoured that part near the town of Stockton, more than any other part of it, nor why the word should, in this case, bear a limited construction, especially when it is found on the face of the verdict that the coals were shipped from within the port of Stockton-upon-Tees.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court(*a*). —Upon this special verdict two questions are raised between the parties; first, whether the plaintiff's coal, which was carried along the Company's railway as far as Simpas-

(*a*) December 5th, 1840.

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ture, and from thence along the Clarence Railway as far as Port Clarence, and there shipped for London, is liable to the higher duty of $1\frac{3}{4}d.$ per ton per mile, as claimed by the defendants, or to the lower duty of only one halfpenny per ton per mile; secondly, admitting the shipment of the coal to have been for the purpose of exportation within the meaning of the statute, whether the plaintiff's coal is liable to pay the duty of 6*d.* per ton for passing the Brusselton Inclined Plane, in addition to the railway duty.

On the first question two points have been made in argument on the part of the Company.—First, that the lower toll, which is imposed by the last branch of the 62nd section on "coal shipped on board any vessel in the port of Stockton-on-Tees for the purpose of exportation," is a cumulative and additional toll, over and above the larger toll imposed by the second branch of that section upon "*all coal*" carried along the railway. Secondly, that if such smaller toll is not cumulative, yet that at all events a shipping for London is not a shipping for the purpose of exportation within the meaning of the act, so as to bring the coal in question within the lesser rate of tonnage.

1. Upon the first point so made by the defendants, we think the proper construction of the 62nd section is, that the latter branch of the clause excepts the coal therein described out of the operation of the general words of the former branch, and imposes a lower duty thereon in lieu and stead of the higher duty. By the former branch, "all coal" generally, which is carried on the railway, is made liable to the higher duty per ton per mile: by the latter, all coal, that shall be shipped for the purpose of exportation, is made liable to a payment "not exceeding one halfpenny per ton per mile." And it is scarcely conceivable that the legislature should not have declared explicitly that this latter payment should be taken "over and above the former," if such had been its intention; or that it should have been provided by an express enactment, that the coal shipped for

the purpose of exportation should be liable to a payment "not exceeding one halfpenny per ton per mile," if at that very time it still continued liable to pay a higher rate of duty under a former provision of the act.

The second and more important point raised on the part of the defendants, depends entirely on the proper interpretation of the term "shipping for the purpose of exportation;" that is, whether those words are satisfied by a shipment, for the carrying out of the port to any other port or place in England, or whether they must be construed to mean and be confined to a shipment, to be carried from the port of Stockton-upon-Tees to ports or places in foreign countries.

That the legislature has, upon various occasions, used the word "exportation" in a sense less extensive than the exporting of commodities to foreign parts or places, and in the more restrained sense of carrying commodities from one port to another within the kingdom, is abundantly evident from the statutes referred to in the course of the argument. And that the word "exportation," when used in this very statute, was intended by the legislature to comprise within it this more restricted sense, appears by no means improbable, when the 28th section of the 9th Geo. 4, c. lx., which was passed for making an additional branch to the Stockton and Darlington Railway, is carefully compared with the 60th section of the 9th Geo. 4, c. lxi., which was passed for the original formation of the Clarence Railway Company, explained as it is by the 37th section of the 10th Geo. 4, c. cvi., passed for the amendment of the last-mentioned act. The two acts, passed in the 9th year of George the Fourth, viz. chapters lx. and lxi., received the royal assent on the same day; the subject matter of both is closely connected together, for the Clarence Railway communicates with and enters into the Stockton and Darlington Railway at Simpasture farm; and the sections therein above referred to are those which im-

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pose the duties for carrying goods along each respective railway. The duty imposed by the Stockton and Darlington Railway Act, s. 28, is in these terms:—"on all coal, &c., carried upon the new branch railway, and which shall be shipped on board of any vessel in the river Tees for the purpose of exportation, a lower duty;" and "for all coal which shall not be shipped for exportation," a higher duty. The Clarence Railway Act imposes also a lower duty on "all coal carried on the said railway for exportation," and a higher duty on "all coal carried upon the said railway for home consumption." Now it is obvious that the terms "coal shipped for exportation" in the first act, and "coal for exportation" in the second, must mean one and the same thing. And when we find, in the 10 Geo. 4, c. cvi., which is an act for enabling the Clarence Railway Company to vary their line, and for altering, amending, and enlarging their powers, that the legislature, in the 37th section, has enacted that "all coals which shall be shipped on board any vessel *in the river Tees*, and entered at the custom-house of the port of Stockton-upon-Tees shall be deemed and taken to be for exportation under the said recited act, and this act," it appears a reasonable inference that the legislature intended the same thing by the words "shipped on board vessels for the purpose of exportation" in the second Stockton and Darlington Railway Act.

But it appears to us to be sufficient for the determination of the present point, if the word is only ambiguous in its meaning; for, in that case, the general principle laid down by Lord *Ellenborough*, C. J., in his judgment in the case of *Gildart* v. *Gladstone* (*a*), (an action for Liverpool Dock dues,) will govern this case. Lord *Ellenborough* there says,—"If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interests of the public,

(*a*) 11 East, 685.

and most against that of the Company; because the Company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged, unless it be clear that it was so intended." Again, in the case of *The Dock Company at Kingston-upon-Hull* v. *Browne* (*a*), Lord *Tenterden*, C. J., says, "These rates are a tax upon the subject; and it is a sound general rule that a tax shall not be considered to be imposed (or at least not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it." See also the opinion of *Bayley*, J., in *The Leeds and Liverpool Canal Company* v. *Hustler* (*b*), and the opinion of *Holroyd*, J., in *Brittain* v. *The Cromford Canal Company* (*c*), to the same effect. We therefore think the just construction of the 62nd section is, that the coal in question must be considered as coal shipped for exportation, and consequently liable to the lower duty only.

The second question raised upon this record is, whether the coal so carried on the railway for exportation is liable to the payment of the toll for passing the inclined plane, which question also depends on the proper interpretation of the same 62nd section. And we think the intention of the legislature is sufficiently clear that the coal in question is liable to that payment. The duty payable for the carriage of coal on the railway, whether for the purpose of exportation or not, although it varies in amount, is a duty of so much "*per ton per mile.*" The duty payable in respect of passing the inclined plane is a duty of so much "*per ton,*" without reference to distance: it is a duty, therefore, of a perfectly different character to the former, to be superadded to the distance duty if the coal passes over the inclined planes. And when the statute enacts that

(*a*) 2 B. & Ad. 58. (*b*) 1 B. & C. 424, 2 D. & R. 556.
(*c*) 3 B. & A. 139.

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"all the articles, matters, and things, for which a tonnage is *hereinbefore* directed to be paid," shall be liable to the duty for passing the inclined planes, we think *all* coals are included; for that is the language of the next preceding paragraph, and is large enough to include coal intended for exportation, which is afterwards made liable to the lower duty: and, indeed, the proper mode of reading the section is, to incorporate the last paragraph as an exception to be added to the former more general one, which allows 4*d.* per ton per mile to be taken; as if that paragraph had been followed by such words as these, "except coals shipped for exportation, for which the Company may take such sum as they shall appoint, not exceeding one halfpenny per ton per mile." We therefore think the amount of the duty to be taken should be calculated upon the principles above laid down, and that the verdict should be entered for the difference between that sum and the sum demanded by the defendants, and received by them under protest from the plaintiff.

Judgment accordingly (*a*).

(*a*) IN THE EXCHEQUER CHAMBER.

(*In Error.*)

1842.
Feb. 15*th.*

THE STOCKTON AND DARLINGTON RAILWAY COMPANY *v.* BARRETT.

THE plaintiff in the above case having entered up judgment, the defendants brought error in the Exchequer Chamber. The case was argued in *Michaelmas* Vacation (December 7th), 1841, before Lord *Denman*, C. J., Lord *Abinger*, C. B., *Patteson* and *Williams*, Js., and *Parke* and *Alderson*, Bs.

Sir *W. Follett*, Solicitor General, for the plaintiffs in error (the defendants below), besides the other points argued in the Court below, con-

tended that, assuming the judgment of that Court to be correct, that, for coal brought along the railroad into the port of Stockton for the purpose of exportation, the Company are entitled to receive only one halfpenny per ton, the limitation of toll to that *maximum* applies only where the coal is brought along the railway to its *terminus* (the port of Stockton), and from the railroad put on board ship for exportation; and is not applicable to the case of coal brought along the railway to Simpasture, and then taken off, and by other means carried into the port to be exported.

Sir *T. Wilde*, contrà, contended that it was clear from the language of the act, the preamble of which uses the words "at or near Stockton," and from the fact of its being intended for the purpose of making a railway with five collateral branches terminating in different points, and the appointment of a mileage payment, that the legislature contemplated no such necessary terminus, but that a part only of the railway might be used for such coal. As to the interpretation of ambiguous language in the powers of acts, he cited the judgment of Lord *Cottenham*, C., in *Webb* v. *The Manchester and Leeds Railway Company*, (ante, vol. 1, p. 599; S. C., 4 Myl. & Cr. 120.)

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. We entirely agree with the Court of Common Pleas in their judgment on this case, and therefore think it unnecessary to refer particularly to the reasons given for their decision, in which also we entirely concur.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Common Pleas.)

1841.
Jan. 12.

THE LONDON GRAND JUNCTION RAILWAY COMPANY v. FREEMAN.

By the London Grand Junction Railway Act (6 & 7 Will. 4, c. civ) the Company are required (s. 145) "to cause the names and additions of the several persons who shall then be or shall thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made to cause their common seal to be affixed thereto." By sect. 147 it is enacted, "that the Company shall, in some proper book to be provided by them for that purpose, enter and keep a true account of the places of abode of the several proprietors of the undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein." And sect. 152 enacts, "that, in any action to be brought by the Company against any proprietor for the time being of any share in the said undertaking to recover any money due and payable for or in respect of any call, in order to prove that the defendant, at the time of making such call, was a proprietor of such share as alleged, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the undertaking, with the number of shares they are repectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein:"—*Held*, that the book thus made evidence by sect. 152 is the book which the Company are required by sect. 145 to keep.

And that a book kept by the Company, containing the names and additions of all the persons whom they supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscriptions paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the Company—was a book substantially kept in compliance with the act, and admissible in evidence, though it contained names of persons not entitled, and omitted some of persons who were entitled to shares, and some entries to which there was no seal affixed.

Held also, that the *primâ facie* evidence of the defendant being a proprietor, supplied by the production of this book, was not rebutted by proof that another person was the original subscriber to the parliamentary contract in respect of the shares in question, and had not conveyed them to the defendant by deed, as required by sect. 155; and therefore that the defendant, who having before the passing of the act become entitled by the then well-understood mode of transfer (in the form of scrip) was afterwards registered as a shareholder, was liable to pay calls on such shares.

DEBT. The declaration stated that the defendant, on the 1st September, 1837, being a proprietor of divers, to

wit, twenty shares in a certain undertaking mentioned in a certain act of Parliament (6 & 7 Will. 4, c. civ), intituled &c. (*a*), that is to say, a certain undertaking for making and maintaining the said railway and other works in that behalf mentioned in the said act, was and is indebted to the plaintiffs in a large sum of money, to wit, the sum of 20*l.*, for and being the amount of a call of 1*l.* upon each of the said shares of the defendant; whereby and by virtue of the said statute an action hath accrued to the plaintiffs &c.

The defendant pleaded—1. *Nunquàm indebitatus;* 2. That he never was the proprietor of the said shares, or of any of them, *modo et formâ*, &c. Issue thereon.

The cause was tried before Coltman, J., at the sittings in London after Easter Term, 1839, when a verdict was found for the defendant. A bill of exceptions was tendered to the learned Judge on his charge to the jury. Judgment having been signed, a writ of error was brought thereon, and the record removed into this Court (*b*).

(*a*) "An act for making a railway to join the London and Birmingham Railway at or near the Regent's Canal, in the parish of St. Pancras, in the county of Middlesex, and proceed from thence to Skinner Street in the city of London, to be called 'The London Grand Junction Railway.'"

(*b*) The sections of the act (6 & 7 Will. 4, c. civ), material to the case, are as follows:—

Section 1, after reciting the 3 Will. 4, c. xxxvi, and the 5 & 6 Will. 4, c. lvi (the London and Birmingham Railway acts), and that the making a railway commencing at or near the line of, and to form a junction with the London and Birmingham Railway at or near the Regent's Canal, and terminating at or near Skinner Street, in the parishes of St. Andrew Holborn and St. Sepulchre in the city of London, would be of great public advantage, by opening an additional, cheap, certain, and expeditious communication between the city of London and Camden Town, Hampstead, Highgate, and the adjoining places, and also, by forming such junction as aforesaid with the said London and Birmingham Railway, would facilitate the conveyance of persons, goods, and merchandize between the city of London and the towns of Liverpool, Birmingham, and Manchester, and the several intermediate and adjacent places—enacts that the several persons there-

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The bill of exceptions stated the following facts:—On the part of the plaintiffs it was proved, that the first general meeting of the Company was held on the 14th of September, 1836, being (as required by s. 118) within six

in named, and among them Lieutenant Colonel *Henry White*, "and every other person and corporation that *has subscribed* or *shall hereafter subscribe* towards the said undertaking, and their several and respective successors, executors, administrators, and *assigns* shall be, and they are hereby united into a Company for making and maintaining the said railway and other works by this act authorized, and for other the purposes herein declared, according to the provisions and restrictions hereinafter mentioned; and for that purpose shall be one body corporate by the name and style of 'The London Grand Junction Railway Company,' and by that name shall have perpetual succession and a common seal, and by that name shall and may sue and be sued; and also shall have power and authority, from and after the passing of this act, and at all times thereafter, to purchase, hold, and sell lands for the use and benefit of the said undertaking, without incurring any penalties or forfeitures of the statute of mortmain or otherwise, and shall have and exercise all other powers and authorities which are hereinafter given or mentioned."

Section 3 enacts "that it shall be lawful for the said Company to raise amongst themselves any sum of money for making and maintaining the said railway and other works by this act authorized, not exceeding in the whole the sum of 600,000*l.*, the whole to be divided into shares of 50*l.* each; and such shares shall be numbered, beginning with No. 1, in arithmetical progression, and every such share shall be distinguished by the number to be applied to the same; and the said shares shall be and are hereby vested in the several parties taking the same, and their several and respective successors, executors, administrators, and *assigns*, to their proper use and benefit, proportionably to the sum they shall severally contribute; and every person and corporation, and their several and respective successors, executors, administrators, and *assigns*, who have *subscribed* or *shall hereafter subscribe* for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof, towards the said undertaking, and other the purposes of the said subscription, shall be entitled to and receive in proportionable parts, according to the respective sums so by them respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same shall be divided by the authority of this act."

Section 145 requires the Company, "at their first or some subsequent general meeting, and afterwards from time to time as occasion may

calendar months next after the passing of their act of incorporation; and that notices of such meeting, signed by the then chairman of the directors of the Company, were given and published more than ten days previously to the

require, *to cause the names of the several corporations and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company*, and, *after such entry made, to cause their common seal to be affixed thereto;* and the said Company shall from time to time cause a certificate or ticket with the common seal of the said Company affixed thereto to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said Company the sum of *2s. 6d.*, and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all courts whatever as *primâ facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein specified, but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof." And the clause gives a form of a certificate.

Section 147 enacts, "that the said Company shall, in some proper book to be provided by the said Company for that purpose, enter and keep *a true account of the places of abode of the several proprietors of the said undertaking*, and of the several corporations who shall from time to time become proprietors thereof, or be entitled to any share therein," &c.

Section 148 recites, that, "whereas by the death of or by other events happening to proprietors, or by the marriage of female proprietors of shares in the said undertaking, it may be difficult to ascertain to whom such shares, or the dividends arising or becoming due upon such shares, may belong or ought to be paid;" and enacts, "that, in all cases when the right of property in any share in the said undertaking shall pass from any proprietor thereof to any other person or corporation, *by any other legal means than by a transfer or conveyance thereof duly made and executed as herein directed*, a declaration in writing shall be made according to the provisions contained in the 5 & 6 Will. 4, c. 52, by some credible person before some Master or Master extraordinary in the High Court of Chancery, or any of His Majesty's justices of the peace, stating the manner in which such share hath been passed to such other person or corporation, and such affidavit or affirmation shall

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holding thereof, by advertisements inserted on three consecutive days, viz. the 17th, 18th, and 19th of August, in three of the London newspapers (as required by s. 121), which were produced; and that the following notice was at the same time inserted in the same newspapers:—

be transmitted to the said Company, who shall thereupon enter and register the name of every such new proprietor in the register book or list of proprietors of the said Company;"—"and before such declaration shall have been transmitted and such entry made as aforesaid, no person or corporation to whom any such share shall have passed as aforesaid shall be entitled to receive any part of the profits of the said undertaking, or to vote or exercise any of the privileges of a proprietor in respect of such share: Provided always, that, before any person who shall claim any part of the profits of the said undertaking in right of marriage with any female proprietor shall be entitled to receive the same, or be entitled to vote in respect of any share, a declaration as aforesaid in writing, containing a copy of the register of such marriage or other particulars of the celebration thereof, and identifying the wife as the proprietor of the shares in respect whereof any such claim may be made, shall be made by some credible person before some Master, &c., and shall be transmitted to the said Company, who shall file the same, and make an entry thereof in the book which shall be kept for the entry of transfers or sales of shares in the said undertaking; and, before any person or corporation who shall claim any of the profits of the said undertaking by virtue of any bequest or will in the course of administration shall be entitled to receive the same, or be entitled to vote in respect of any share, the said will, or the probate thereof, or the letters of administration, shall be produced and shewn to the said Company."

Section 152 enacts, "that, in any action to be brought by the said Company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call or so many calls of such sums of money upon a share belonging to the said defendant, whereby an action hath accrued to the said Company, by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who

"London Grand Junction Railway Company.

"Notice is hereby given, that, in pursuance of the act of Parliament, a registry is now in the course of being made out of all persons entitled to shares in the capital stock of this Company; and it is necessary that holders of

made such calls, or any other matter whatsoever, and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid on such calls, unless it shall appear that any such call exceeded 5*l.* per share, or was made payable before the expiration of two calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required; and, in order to prove that the defendant was a proprietor of such share in the said undertaking as alleged, the production of the *book* in which the said Company is by this act directed to enter and keep *the names and additions of the several proprietors* from time to time of shares in the said undertaking, *with the number of shares they are respectively entitled to*, and of the *places of abode* of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Section 155 declares, that it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors and administrators and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions therein mentioned. The clause then gives the form of conveyance (which is to be under seal), and proceeds to enact, that, "on every such sale, the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or by some secretary or clerk of the said Company, who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer; and the said Company, or some secretary or clerk as aforesaid, is hereby required to make such entry or memorial accordingly, and, on demand, to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security, and such indorsement, being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and until such memorial shall have been made and entered as before directed, *the seller thereof shall remain and be held liable for all future calls*, and the purchaser shall have no part or share of the profits of the said undertaking, nor any

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scrip-certificates should exchange the same for certificates of shares under the common seal of the Company, preparatory to a general meeting, as holders of scrip-certificates cannot attend or vote at such general meeting unless they are duly registered as proprietors. Every holder of scrip-certificates is therefore requested to leave or cause the same to be left (free of expense) at the Company's office before the 10th of September next, with a memorandum in writing on the back thereof, stating his Christian and surname, profession, and residence. Due notice of the certificates being ready for delivery will afterwards be given."

Edmund Ayres, who was called as a witness, stated, that he was the secretary of the Company, and had been such secretary from June, 1838, when he succeeded one Gilson, who was the secretary before the passing of the act, and so continued down to the time the witness succeeded him, and that the witness had been in the service of the Company as their clerk, and assisted Gilson, from November, 1835, until he became secretary; that, about the time the above-mentioned advertisements were published, the directors of the Company provided a book for the purpose of entering therein, and forming a register of the names and additions of parties entitled to shares in the undertaking, with the number of their shares, which was called "The Register Book," [see ss. 145, 147,] and that,

interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking."

Section 223, reciting that "the probable expense of making the said railway and the other works thereby authorized, would amount to the sum of 600,000*l.*, and that the sum of 350,000*l.*, or more than one-half thereof, had been *already subscribed for* by several persons under a contract binding themselves, their heirs, executors, administrators, and *assigns*, for the payment of the several sums by them respectively subscribed for" —enacts "that the whole of the said sum of 600,000*l.* shall be *subscribed for* in like manner before any of the powers given by this act, in relation to the compulsory taking of land for the purposes of the said railway, shall be put in force."

previously to the said first general meeting, the names of many persons were entered by Gilson in that book as being entitled to shares; that the names so entered were taken from indorsements upon documents called "Scrip-Certificates," as they were from time to time left at the office of the Company after the publication of the above advertisement; that, at the first formation of the Company, before the act was passed, persons desirous of obtaining shares in the undertaking paid a deposit of £2 per share upon the number of shares they intended to take, to the bankers appointed for that purpose, from whom they obtained a receipt for such deposit, and, on production of that receipt at the office of the Company, a scrip-certificate was delivered to them, in the following form—the blanks appearing therein being filled up according to the number of shares taken and the numbers by which such shares were therein distinguished:—

"London Grand Junction Railway.

"Capital £600,000, in shares of £50 each, deposit £2 per share.

"CERTIFICATE.

"—— shares of £50 each, No. —— to No. ——, on which a deposit of £2 per share has been paid.

"The holder of the above shares, having signed the parliamentary engagement, and having agreed to pay all calls in respect thereof, is the proprietor of —— shares in the above undertaking.

"A. B.
"C. D. } Directors."
"E. F.

"London —— Nov. 1835.

"Entered

"G. H., Secretary."

That all such scrip-certificates, at the time they were issued by the Company, were signed by three of the persons who then acted as directors of the Company, and were marked as entered by Gilson as secretary, and that the same became saleable, and were commonly sold in the market,

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immediately after they were so issued; that the numbers mentioned in the scrip-certificates as distinguishing the shares, were in arithmetical order, from No. 1 upwards, as they were issued from time to time, and that scrip-certificates were issued for upwards of 11,000 shares in the whole; that, after the passing of the act, and publication of the advertisement, a great number of scrip-certificates which had been issued as above mentioned, were brought to the office of the Company, indorsed with the names, professions or additions, and places of abode of persons, for the purpose of their being registered as shareholders, and to each person leaving one of them a receipt was delivered in the following form:—

"Memorandum, that the undersigned has received of ———, ——— scrip-certificates for ——— shares in the London Grand Junction Railway, for which certificates of shares, under the common seal of the Company, will be delivered on or after the ——— day of ———, 1836, on receipt of this memorandum"—

which receipt was signed by the witness, it being a part of his duty so to do, and the blanks appearing therein being respectively filled up with the name indorsed on the scrip-certificates left, with the number of them, and of shares mentioned in them, and the dates; that, on the 30th August, 1836, one of such scrip-certificates, filled up for twenty shares of £50 each, numbered from 11865 to 11884, both inclusive, dated the 25th November, 1835, was brought to the office of the Company by some person not known to the witness, indorsed as follows—"Robert Marriott Freeman, Surgeon, Stony Stratford, Buckinghamshire—" for which a receipt in the above form, signed by the witness, and filled up with that name and number of shares, was delivered to the person bringing it: and such scrip-certificate was then and there produced and read in evidence at the trial, and was exactly in the form above set forth, and was signed and marked as entered in

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the manner above described—(it being also then and there proved by another witness, that *the indorsement upon such scrip-certificate was in the hand-writing of the defendant*, and that the defendant at the time of the trial resided and exercised the profession of a surgeon at Stony Stratford, in Buckinghamshire, and had done so continuously for upwards of twelve years previously and up to that time, and that no other person of that name and profession resided there).

That, when and as the scrip-certificates indorsed as aforesaid were brought from time to time to the office of the Company, or as soon after as practicable, entries were made in the register book so provided as aforesaid of the names, additions, and places of abode indorsed on such scrip-certificates, and of the number of shares specified in each, in all respects corresponding with the contents of each of such scrip-certificates and the indorsement thereon, except only as regards the numbers by which the shares were distinguished; that the numbers distinguishing the shares were entered in the register book in arithmetical order, from No. 1 upwards, as they were registered from time to time; but, as many of the scrip-certificates which were issued late, and in which the shares were distinguished by the higher numbers, were left at the office to be registered very early, and before those previously issued, the entry in the book varied from the scrip-certificates in this particular, but in no other respect—the number and value of the shares as entered in the register-book corresponding precisely with the scrip-certificates; that, after those entries were made in the book, certificates or tickets were made out, with the common seal of the Company affixed thereto, specifying the number of shares registered in the name of each person as aforesaid, and were delivered to a great number of those persons who had left scrip-certificates indorsed in the manner before mentioned, and that four such certificates, for five shares each, were made out in the name of the defend-

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ant, and the said seal affixed thereto, but were never called for by any one; and, being produced by the witness at the trial, they appeared to be all in the following form, and varying in no particular except the numbers distinguishing the shares of each :—

"London Grand Junction Railway Company.

"Incorporated by Act of Parliament, July 4th, 1836.

"Capital 600,000*l.*, in 12,000 shares of 50*l.* each.

"These are to certify that Robert Marriott Freeman, surgeon, is the proprietor of five shares, No. 2896 to 2900, of the London Grand Junction Railway Company.

"Given under the common seal of the said Company the 6th day of October, 1836.

"No. 1380. L. S.

"Entered, L. Gilson, Sec."

That, shortly after the said scrip-certificate indorsed with the name of the defendant was left at the office as aforesaid, and before the said first general meeting of the Company, an entry was made in the register book corresponding with such indorsement and with the said certificate of shares, and that, after such entry was made, the witness was present and assisted at such meeting, and that the common seal of the Company was then and there affixed to the book at a part subsequent to such entry, and on one of the pages thereof immediately below the last entry therein contained at that time.

That all the entries in the register book (which was produced) were in the hand-writing of Gilson; that the seal appearing to be thereto affixed in several places, was the common seal of the Company; and that the same was brought from the office of the Company by the witness (in whose care it had been ever since he became the secretary of the Company), and contained an entry as follows:—"Robert Marriott Freeman, surgeon, Stony Stratford, Buckinghamshire—Number of shares taken, 20—Total amount subscribed, 1,000*l.*—Deposit, 40*l.*;"

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and in the margin of the said book, immediately opposite the said name, and as part of the entry, were specified the numbers by which such shares were therein distinguished, and which were from 2896 to 2915, both inclusive.

That no addition to the said book, or alterations therein, had been made since the said seal was affixed thereto at the first general meeting as aforesaid, except entries in the same form and expressing the same particulars as to shares subsequently registered, and the said seal being again affixed upon several of the subsequent pages thereof; the last-mentioned entries having been made at parts of the book both before and after the pages on which the first seal appeared: that the Company had also provided another book for the purpose of entering an account of the places of abode of the proprietors of the said undertaking, [s. 147], and of the several persons entitled to shares therein, (which was produced, and contained an entry as follows—"Robert Marriott Freeman, Stony Stratford, Buckinghamshire"); that a meeting of the Company was duly held on the 28th November, 1836, and the directors present thereat passed a resolution that a call of 1*l.* per share should be made upon the subscribers to and proprietors of the said undertaking, to defray the expenses of and carry on the same—which resolution, signed by the chairman of the said directors, was produced and read in evidence, and was as follows:—

"Resolved—That a call of 1*l.* per share on the respective shares in this Company be made, payable on or before Tuesday, the 3rd January next, at this office, or at the banking-house of Messrs. Jones, Lloyd, & Co., Lothbury, London."

That such call was accordingly made, and notified by circular letters addressed to the registered proprietors of shares in the said undertaking, and one of such circulars was put into the general post on the day of the date thereof, addressed to the defendant at Stony Stratford.

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That more than twenty-one days' notice of such call (which was the first that was made by the directors of the Company) was given by advertisement inserted in two London newspapers—the Times of the 1st December, 1836, and the Morning Herald of the same day—and also in the same and other London newspapers of the 3rd of the same month; and such notice, previously to its being advertised and inserted in the said newspapers, was signed by Sir S. Whalley, then being the chairman of the directors of the said Company. [These advertisements were produced and read.]

That, after the time appointed for the payment of the said call, circular letters were written and addressed to all the several persons whose names were entered as aforesaid in the register book as proprietors of shares in the undertaking, who had not paid the said call; and that one of such circulars was put into the general post, addressed to the defendant at Stony Stratford.

That neither of the said letters was ever returned to the office of the Company, or any answer thereto received; and that no payment had been made in respect of the said call upon any of the shares so registered in the name of the defendant as before mentioned, or any sum subscribed in respect thereof, except the deposit of 40*l.* appearing in the above entry.

The witness Ayres, being cross-examined by the counsel for the defendant, proved, that the only modes by which persons became shareholders in the Company before the act of Parliament passed, were, by paying the deposit money to the bankers appointed for that purpose, and obtaining scrip-certificates, or by buying such scrip-certificates in the market, of persons who had so previously obtained them; that, before the act passed, the shares were sold by selling the scrip-certificates, but no entry of any such sale or transfer was made in any book kept by the Company, or any account kept by the Company of any such sale or transfer;

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and that no entry was made in any book, except of those persons who, having paid the deposit money at the bankers', brought a receipt for the same and obtained scrip-certificates, all of whom were required to sign, and signed, and alone signed the parliamentary contract: That the witness was in attendance at the office of the Company during the time the secretary was preparing the register book, so far as related to the entries therein made up to the time of the first general meeting, and that those entries were made by the secretary from scrip-receipts which were brought to the office, as well by persons who had originally paid deposits into the bankers' and signed the parliamentary contract, as by others who had not, but were merely holders of the scrip-certificates, and that the entries were so made according to the names indorsed on such certificates, whether those names were the names of original subscribers or of others, and that such register book was the first book in which any entry was made of scrip-certificates after they were brought in by those two classes of persons; that an entry of all the scrip-certificates issued by the Company was made in the margin of a book called the "Scrip Book," from which the scrip-certificates were cut, (and which was referred to by the word "entered" appearing on the certificates), expressing the time when the certificates were issued and the name of the person to whom they were first delivered; that the entries were made in the register book according to the order in which the scrip-certificates were brought in, without regard to the numbers mentioned in such certificates; that no names were entered in the register book before the first general meeting but those indorsed on scrip-certificates brought in, and that the number of shares ascribed to each name was the number of shares for which the scrip was brought in; and that the shares were allotted as the scrip-certificates were brought in, in numerical order.

That it appeared by the register book, that the shares

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from No. 905 to 1000 *had never yet been allotted*, and that a blank space still appeared therein opposite those and the intervening numbers; the shares from No. 1001 upwards being allotted to the persons whose names were registered.

That the certificates, made out under the seal of the Company for delivery to the persons registered as shareholders from time to time, were so made out that some of them were for one share each, and others for five shares each, and that the first thousand shares, numbered from 1 up to 1000, were reserved, in order that the certificates issued for them might each be made out for one share only, for the accommodation of those proprietors who wished to have their certificates for one share instead of five shares each, and also for the purpose of making up the numbers in cases where persons were entitled to a number of shares not divisible by five; that the said blank was occasioned by the whole of the shares so reserved, and numbered in the book from 1 to 1000, not having been yet allotted, and the shares commencing with No. 1001 upwards having been allotted in certificates for five shares each to persons whose names appeared in the book; that, when proprietors brought in their scrip-certificates and wanted sealed certificates for one share each, shares numbered below 1000 were allotted to them, and their names were entered in the register book in regular series in a blank space opposite the numbers below 1000 which remained unappropriated at the time; that this was done in some instances after the common seal had been affixed to some subsequent parts of the book, and that, as far as related to those shares numbered below 1000, the witness could not distinguish, between the entries made before the common seal was affixed, and the entries made after the common seal was affixed to some one of the subsequent parts of the book in which it was affixed; that scrip-certificates for between 11,000 and 12,000 shares were

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issued before the first general meeting; that persons who had paid deposits on shares to the bankers, and signed the parliamentary contract, were not registered as proprietors unless they brought in the scrip-certificates, and that a great number of shares on which deposits were paid, and for which the scrip-certificates were given, had not been brought in at the time of the first general meeting; that the register book contained a column for entering the amount of the calls paid on the shares registered, but that entries were not made therein of all the persons who had paid the first call, and that it could not be ascertained thereby how many had paid the call, and how many had not; that applications for payment of the calls were made to those only who were registered as shareholders in the register book (though it was paid by others also), and not to original proprietors who had not brought in their scrip-certificates; that above three hundred new shares were sold by the Company after the passing of the act, but the witness was unable to tell what proportion of the shares registered after the first general meeting, or between the periods at which the common seal of the Company was subsequently affixed to the register book, consisted of new shares, and what of original shares for which scrip-certificates had been given; that 7725 was the number distinguishing the last share registered at the time the seal was first affixed; 8910, the last share registered when it was affixed the second time, 27th February, 1837; and 9540, the last registered prior to the seal being affixed the last time, which was in February, 1831: that there was no minute or memorandum made to distinguish the circulars sent by the witness from those sent by the secretary, and no book was kept in which they were entered; that they were sent to persons registered as shareholders only, and not to original shareholders; that no inquiry was made, when persons brought scrip-certificates who had not been original sub-

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scribers, into their responsibility, or how they had become possessed of the certificates; that no account was taken by the Company or their servants of transfers of scrip-certificates from original subscribers to persons becoming holders of them before they were brought in to be registered; that they might pass through many hands before they came to the office to be registered; that, whoever brought one to the office, and put his name, profession, and address on the back, was registered as proprietor of the number of shares therein specified, unless notice was received from some other person to the contrary; that, since the passing of the act, the shares registered were transferred *by deed* [see s. 155] which was left in the office, and then the transfer was made accordingly in the books; that a person named White paid the deposit on the shares above mentioned as numbered from 11865 to 11884, and was the original subscriber who signed the parliamentary contract in respect thereof; that his address was known to the secretary and clerk of the Company at the time when the scrip-certificates for those shares were left for registration as before mentioned; and that they had no note, memorial, or memorandum of transfer of, or authority from him to transfer those shares to any one.

The witness Ayres, being re-examined by the counsel for the plaintiffs, proved, that all the names and entries contained in the register book, as they appeared therein up to that part where the common seal of the Company was affixed thereto for the last time, were so entered and made before the seal was so affixed, and that no names had been entered therein since the last seal was affixed, excepting only that some entry might have been since made as to shares numbered between 1 and 1000, in the blank left for that purpose, in cases where parties might have brought scrip-certificates for a number of shares not exactly divisible by five; that such seal was so affixed at the last general half-yearly meeting of the Company, which was

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held on the 28th February, 1838, at which time the register book was in the same state, with the above exception, as it was when produced at the trial; that the whole entry made in the said book as to the shares therein allotted to the name of the defendant, was entered, as it appeared at the trial, before the common seal was affixed to the book for the *first* time; that the call of £1 per share above mentioned was made generally on all the proprietors, and that some of those who held scrip-certificates which had not been registered paid the call after it was made to the bankers of the Company.

The bill of exceptions then continued thus: Whereupon the counsel for the plaintiffs did then and there insist before the said Justice, that the several matters so produced and given in evidence on their part as aforesaid, were sufficient, and ought to be admitted and allowed as sufficient evidence, unless explained or answered by evidence on the part of the defendant, to entitle the plaintiffs to a verdict, and prayed the said Justice to direct the jury to that effect. But the counsel for the defendant did not offer any evidence on his behalf, and then and there insisted before the said Justice, that the said several matters did not require any explanation or answer by evidence, and were not sufficient, and ought not to be admitted or allowed to entitle the plaintiffs to a verdict, and that, upon the evidence so given, the defendant was entitled to a verdict, and prayed the said Justice so to direct the jury: and the said Justice did then and there declare and deliver his opinion to the jury, that the evidence given on the part of the plaintiffs was not sufficient to entitle them to a verdict on either of the issues; that there was no evidence of the defendant being a proprietor of the said shares in the undertaking in the declaration mentioned; that the register book which had been produced was not made up in a way conformable to the act of Parliament; that the act required that the parties who were *original* proprietors of shares

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should be in the first instance entered as the proprietors, and then that the shares should be transferred according to the provision in the said act contained as to the transfer of shares; that the only persons the Company were entitled to enter in the said book, were the parties who were *original* proprietors of shares, or their personal representatives, or persons entitled by transfer under the act; and that a person who produced a scrip-certificate was not entitled to be entered a proprietor in virtue of such certificate merely: and with that direction the said Justice left the case to the jury, who returned a verdict for the defendant: whereupon (*a*) the counsel for the plaintiffs did then and there, on behalf of the said plaintiffs, except to the said opinion and direction of the said Justice, and insisted on the several matters aforesaid as entitling the said plaintiffs to a verdict on the said several issues.

The exceptions were argued in the Exchequer Chamber on Monday, the 7th, and Wednesday, the 9th December, 1840, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js., and *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

Talfourd, Serjt., (*Swann* with him), for the plaintiffs.—Two questions are presented to the Court upon this bill of exceptions—first, whether the evidence offered on the part of the plaintiffs was sufficient to shew that the defendant, at the time the call was made and the action brought, was a proprietor of shares in the undertaking; secondly, whether the presumption arising out of such evidence was rebutted by the facts elicited on cross-examination from the witness Ayres.

I. By the 145th section of their act, the Company are required "to cause the names and additions of persons who shall from time to time become entitled to shares,

(*a*) As to exceptions to the direction *after the finding* of the jury, see *Armstrong* v. *Lewis*, 2 C. & M. 274, 4 M. & Scott, 1; and the cases cited in *Culley* v. *Doe* d. *Taylerson*, 11 A. & E. 1013.

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with the number of those shares, and the amount of subscriptions paid thereon, and their distinguishing number, to be entered in a book to be kept by the Company, and after such entry to cause their common seal to be affixed thereto. By section 147, they are required "to enter in a book the places of abode of the several proprietors." And section 152 provides "that the production of the book, in which the said Company is by this act directed to enter the names and additions of the several proprietors, with the number of shares they are entitled to, *and of the places of abode* of the several proprietors of the undertaking, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein." An objection was taken to the book produced at the trial of this cause, that it was not admissible in evidence, on account of certain omissions and irregularities in the entries. But it has been held in the case of *The Southampton Dock Company* v. *Richards* (*a*), where the provisions of the act were similar to these, and the same objection was taken to the book, that such mistakes and inaccuracies in the entries did not render the book inadmissible as *primâ facie* evidence, if it appeared to have been honestly and *bonâ fide* kept. The same principle will apply to this case. And there the book was the only evidence against the defendant.

But here the plaintiffs' case does not rest solely upon the evidence furnished by the statute; there was evidence independently of the book that the defendant was a proprietor of the shares in question. There was an indorsement in his own hand-writing on a scrip-certificate for twenty shares brought to the Company's office to be registered, of his name, addition, and place of abode. As it appears the defendant did not sign the parliamentary contract, and as he can only become a proprietor in that way

(*a*) Antè, p. 215.

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or by a transfer *by deed*, the book being *primâ facie* evidence of his being a proprietor, it lies with him to shew the shares were not conveyed to him by deed. [*Parke*, B. —In a late case in the Court of Exchequer, where the defendant concealed from the Company the fact of the deed of transfer to him being executed in blank, he was held to be estopped from taking advantage of that defect (*a*).] And in *The Cromford and Highpeak Railway Company* v. *Lacey* (*b*), it was held that a defendant, who, with a knowledge of a misrecital in the act, had paid calls and acted as a proprietor, was estopped from questioning the validity of the act on that ground; and that it was not incumbent upon the plaintiffs to shew that the defendant had executed a contract under seal, to prove him a proprietor within the meaning of the act. The case of *The Thames Tunnel Company* v. *Sheldon* (*c*) is very different, there the act was not to be put in force till the whole capital should have been subscribed.

II. The *primâ facie* evidence furnished by the production of the book was not rebutted by the facts elicited from the witness. This question depends principally upon the construction of the 1st, 3rd, and 223rd sections. It is clear that the assigns contemplated in the 1st and 3rd may include persons who have become so antecedently to the act, the assigns of original shareholders; and the 223rd, which, reciting that a certain sum had been subscribed for by persons, under a contract binding themselves, and (amongst others) their assigns, enacts that the whole shall be subscribed for in like manner before the compulsory

(*a*) *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock*, pòst; and see *Hebblewhite* v. *M'Morine*, antè, p. 51.

(*b*) 3 Y. & J. 80. The act (6 Geo. 4, c. xxx) recited that a sum of money had been subscribed by the proprietors under a contract binding their heirs, whereas in fact that sum had not been subscribed by the proprietors.

(*c*) 6 B. & C. 341; 9 D. & R. 278.

powers shall take effect, shews the legislature intended that assigns should receive the benefit of the act; that must be the construction. [*Patteson*, J.—Those sections seem to me irreconcileable.] There is no principle of law or any statute prohibiting the transfer of scrip. There is no mutual confidence necessary, no legal objection *à priori* to a transfer of interests; partners are frequently introduced into a firm by the seniors without reference to the junior part of the firm: and these Companies, before they obtain an act, are no more than large partnerships. The act 6 Geo. 1, c. 18, s. 18, which declares "that all undertakings to the prejudice of trade, or presuming to act as corporate bodies without legal authority, shall be deemed illegal and void, and (section 19) public nuisances and indictable as such," according to the case of *Rex* v. *Webb* (*a*), applies only to undertakings of a fraudulent and mischievous tendency. Lord *Ellenborough*, C. J., says, "It may admit of doubt whether the mere raising of transferable stock is in any case *per se* an offence against the act, unless it has relation to some undertaking or project which has a tendency to the common grievance, prejudice, or inconvenience of His Majesty's subjects, or of great numbers of them." Besides, that act has been repealed by the 6 Geo. 4, c. 91, so that cases of this kind are remitted back to the operation of the common law. *Josephs* v. *Pebrer* (*b*) was decided just before the repeal of the former statute, and that turned chiefly on the illegality of the objects of the association. *Blundell* v. *Winsor* (*c*), and *Duvergier* v. *Fellowes* (*d*), were decided on the same principle, and do not affect this case. That there is nothing illegal in such an association as this appears from *Walburn* v. *Ingilby* (*e*), where Lord *Brougham*, C., says, "To hold such a Company to be illegal, would be to say that every joint-stock Company not incorporated by

(*a*) 14 East, 406.
(*b*) 3 B. & C. 639.
(*c*) 8 Sim. 601.
(*d*) 5 Bing. 248; 2 M. & P. 384.
(*e*) 1 M. & K. 61.

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charter or act of Parliament is unlawful, and indeed indictable as a nuisance; and to decide this for the first time, no authority of a decided case being produced for such a doctrine." And see *Fox* v. *Clifton* (*a*). *Harvey* v. *Kay* (*b*) and *Lawler* v. *Kershaw* (*c*) shew that a person may be proved to be a partner, or to have ceased to be such, by his admission and acts, though he was not proved to have executed a deed. So, in this case, the defendant, by indorsing the scrip-certificates, and sending them to the office of the Company for the purpose of registration, has by his own act made himself a partner in the undertaking, and, as such, liable to all the attendant consequences; at least, it should have been left to the jury to draw their own inference from those facts.

Byles, contrà.—First, the evidence on the part of the plaintiffs did not shew that the defendant was ever the proprietor of the shares in question; and secondly, even if a *primâ facie* case was established, it was rebutted by the facts elicited from the witness on cross-examination.

1. The original proprietor of the shares was White; his name is in the first section of the act; he was, therefore, incorporated by it, and in compliance with the standing order of the House of Commons (of which the Courts take judicial notice, *Lake* v. *King* (*d*)), must have signed the parliamentary contract. It was also proved that he paid the deposit on the shares, and so became the original proprietor; and that no transfer of the shares was made. At the time of the passing of the act, therefore, and on the 25th November, 1835, when the scrip-certificate issued, he was clearly the proprietor. His share consisted legally of an interest and liability. The former he could not trans-

(*a*) 9 Bing. 116; 2 M. & Scott, 146.
(*b*) 9 B. & C. 356.
(*c*) M. & M. 93,
(*d*) 1 Wms. Saund. 133.

fer, it could not pass by delivery, being a mere *chose in action*, not transferable either at law or in equity: nor could he divest himself of his liability but in the way directed by the statute, that is, by deed under seal. The recital of the act 6 Geo. 1, c. 18, that, "in many cases, the said undertakers, &c., have pretended to make their shares in stocks transferable or assignable *without any legal authority*," evidently supposes that such associations were illegal at common law. The 6 Geo. 4, c. 91, confirms this view; it repeals the former statute, reciting "that it is expedient that the said undertakings, &c., should be adjudged and dealt with in like manner, *as the same might have been adjudged and dealt with according to the common law, notwithstanding the said act* (*a*)." In *Josephs* v. *Pebrer* (*b*), *Abbott*, C. J., says, that "trafficking in these shares may very possibly have been illegal at common law, inasmuch as it was bargaining and wagering about an act of Parliament to be obtained in future;" and in *Duvergier* v. *Fellowes* (*c*), *Best*, C. J., says, "There can be no transferable shares of any stock except the stock of corporations, or of joint-stock Companies created by act of Parliament. And, referring to the judgment on that case, the Vice-Chancellor says, in *Blundell* v. *Winsor* (*d*), "that the deed in question is illegal, not only because it trenches on the prerogative of the king by attempting to create a body not having the protection of the king's charter, the shares of which might be assigned without any control or restriction whatsoever; but also because it holds out to the public a false and fraudulent representation, that the shares could be so assigned." In the cases cited on the other side, *Fox* v. *Clifton* (*e*), *Harvey* v. *Kay* (*f*), and *Lawler* v. *Kershaw* (*g*),

(*a*) See *Blundell* v. *Winsor*, 8 Sim. 608.
(*b*) 3 B. & C. 639.
(*c*) 5 Bing. 248; 2 M. & P. 384.
(*d*) 8 Sim. 613.
(*e*) 9 Bing. 116; 2 M. & Scott, 146.
(*f*) 9 B. & C. 356.
(*g*) M. & M. 93.

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the question was between strangers and persons who had held themselves out as partners; and perhaps in this case the defendant might have been held liable to a stranger for the consequences of his representation, but between him and the Company the case is different. The word "assigns" in the 1st and 3rd sections does not mean that the purchasers of scrip shall be assigns. The Company are the statutable assigns of the original trustees, and section 223 treats the parliamentary contract as still binding. The defendant therefore did not become a proprietor before the passing of the act.

2. Nor has he become so since the act passed. The 148th section enacts, that in all cases where the right of property in a share shall pass from the proprietor to any other person by any other legal means than a transfer or conveyance thereof duly made and executed as therein directed, a declaration shall be made according to 5 & 6 Will. 4, c. 52, and an affidavit or affirmation transmitted to the Company. According to the evidence, nothing of this kind was done. The Company had no note or memorandum of transfer, and no authority from White to transfer. That being the case, White, according to section 155, is the person liable for all future calls. [Lord *Denman*, C. J. —Are you prepared to contend that the book was no evidence at all?] It is submitted, that a *venire de novo* would not be awarded, on the ground that the Judge's direction was wrong on one point, which becomes immaterial if, *upon the whole case*, the defendant appears not to be a proprietor; *Crease* v. *Barrett* (*a*), *De Rutzen* v. *Farr* (*b*); and the same rule will apply to a bill of exceptions.

II. Even if a *primâ facie* case of proprietorship was established against the defendant, it was rebutted by the facts elicited from the witness on cross-examination. The *primâ facie* evidence was of two kinds, the conduct of the defendant and the register book.

(*a*) 1 C. M. & R. 919. (*b*) 4 A. & E. 53.

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1. Although there was an indorsement on the scrip-certificate, in the defendant's hand-writing, of his name, addition, and abode, there was no evidence that he brought or authorized the bringing of the scrip. The plaintiffs ought to have given some evidence to connect him with it; the indorsement may have been made for totally different purposes. And even if he had brought it, it might have been for the purpose of becoming a member of the Company, like a person claiming admission into a body corporate. But to make him a shareholder, there should have been a transfer from White, and then the defendant might have had a legal title. In this case, if White had afterwards become bankrupt or insolvent, these shares would have passed to his assignees, even if he had transferred them for a valuable consideration.

2. As to the register book the question is, whether section 152, which makes it evidence, is to receive a liberal or strict construction. For this purpose the defendant must be considered as a stranger, and therefore the rule will apply, which is stated by Lord *Tenterden*, C. J., in *The Stourbridge Canal Company* v. *Wheeley* (*a*), "that any ambiguity in the terms of the contract must operate against the adventurers and in favour of the public, and the plaintiffs can claim nothing which is not *clearly* given to them by the act. This rule is laid down in distinct terms by the Court in the case of *The Hull Dock Company* v. *La Marche* (*b*), where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company* v. *Hustler* (*c*)." It is not contended, that every particular mentioned in section 145 is in the nature of a condition precedent; but a book must be kept which substantially complies with the act. In the case of *The Southampton Dock Company* v. *Richards* (*d*), the defendant

(*a*) 2 B. & Ad. 792.
(*b*) 8 B. & C. 51.
(*c*) 1 B. & C. 424, and in *Barrett* v. *The Stockton and Darlington Railway Company*, antè, p. 442.
(*d*) Antè, p. 215.

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was one of the original subscribers, and had signed the parliamentary contract, and the objections to the book were merely formal. But here there are three substantial objections—1. A whole class of shareholders was omitted, those who had not brought in their scrip-certificates: 2. Many besides original subscribers, or the transferees of shares by deed, were entered, who ought not to have been so according to the act. In *Hare* v. *Waring* (*a*) the transfer-book was held to be no evidence of title, and that the certificates were insufficient without an indorsement of transfer. [*Parke*, B.—That was a question between third persons. The book is only made *primâ facie* evidence for the Company.] 3. Then entries and alterations were made in the book after the common seal had been affixed, which is contrary to section 145. [*Gurney*, B.—No entries were made since the last seal was affixed, and that as to the shares allotted to the defendant was made before the first sealing.] The witness could not distinguish as to the shares numbered below 1000, whether they had been made before or after the affixing of the common seal. [*Alderson*, B.—A seal would not verify entries made subsequently (*b*), but the last seal would verify all the preceding entries.] Even supposing there were *primâ facie* evidence, it does not follow that the learned Judge was wrong in saying, from the whole circumstances of the case, there was no evidence of the defendant being a proprietor.

Swann, (*absente Talfourd*, Serjt.), in reply.—The defendant, by bringing in the scrip-certificate of the shares in obedience to the Company's advertisement, has held himself out as the proprietor of those shares, and so estopped himself from disputing his liability. Those scrip-certificates were evidently intended by the legislature to pass by

(*a*) 3 M. & W. 362.

(*b*) See *The Cheltenham Railway Company* v. *Price*, 9 C. & P. 55.

delivery, as foreign bonds; and *Kempson* v. *Saunders* (*a*) shews, that there may be a good transfer of shares of this kind even before the act be obtained. The book in this case was kept in the same way as that in *The Southampton Dock Company* v. *Richards* (*b*), which is not distinguishable from the present case.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court:—This was an action of debt by the London Grand Junction Railway Company against the defendant, a shareholder, for money due for calls. The defendant pleaded—first, never indebted—secondly, that the defendant was not a proprietor of shares as in the declaration mentioned. Upon these pleas issue was joined. The facts that appeared in evidence were in substance as follows:—The first general meeting was held in September, 1836, within six months of the passing of the act, upon a regular notice. Due notice was given of an intended registry, and that the holders of scrip-certificates should exchange them for share certificates under the Company's seal, at the office, before the 10th September. A register book was provided by the Company, and before the general meeting many names were inscribed therein from indorsements on scrip-certificates left at the office. Before the act, persons desirous of obtaining shares paid a deposit of 2*l.* per share to the bankers of the Company, and producing the receipt at the office obtained scrip-certificates, upon which was the following memorandum—"The holder of the above shares, having signed the parliamentary engagement, and agreed to pay calls, is the proprietor," &c. These scrip-certificates were signed by the directors, and marked "entered" by the secretary; and were sold in the market. After the advertisement, these scrip-certificates

(*a*) 4 Bing. 5. (*b*) Antè, p. 215.

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were brought to the office, indorsed with the names and additions of the holders, who received instead an undertaking to supply certificates of shares on receipt of the memorandum. On the 30th August, 1836, scrip-certificates dated November, 1835, indorsed by the defendant with his name and addition, were brought to the office, and receipts were given to the bearer. These were immediately entered in the register, not according to the numbers appearing on the certificates, but according to the time of their being entered. A sealed ticket was then made out conformable to this entry—one describing the defendant as proprietor of —— shares, but never called for. After the defendant had brought the certificates to the office, the seal was affixed to the register book, (which was produced in evidence), kept by the secretary. It contained a full entry of those shares. There was also another book of names and places of abode of the shareholders, containing the name and place of abode of the defendant. The first thousand shares in the register book were all originally left in blank, for the convenience of those who might bring fewer than five certificates. Beyond that number, the entries were made according to the order in which the scrip-certificates were brought there, without reference to the number of the scrip-certificate. Many scrip-certificates had not been brought in. Entries had not always been made of those who had paid the calls. White was the original subscriber for these shares: his address was known at the office: no call had been made upon him; nor was there any note or memorandum of any transfer from him to the defendant.

The learned Judge before whom the cause was tried told the jury that there was no evidence to entitle the plaintiffs to a verdict; that the book was not kept conformably to the act; that the names of none should have been entered in it but original proprietors of shares or their personal representatives, or those to whom these had conveyed in

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manner provided by the act; and that a holder of scrip-certificates was not thereby entitled to be entered.

The jury accordingly returned a verdict for the defendant: and the case comes before us upon exceptions taken to the ruling of the learned Judge.

The question has been fully argued before us. It depends upon the construction to be put on the Company's act, which describes the work contemplated, and enacts (s. 1) that certain persons named, "and every other person and corporation that has subscribed or shall hereafter subscribe towards the said undertaking, and their several and respective successors, executors, administrators, and assigns, shall be and they are hereby united into a Company for making and maintaining the said railway and other works by this act authorized." The third section gives the Company power to raise amongst themselves 600,000*l.* for making and maintaining the rail-road and works, the whole to be divided into shares of 50*l.* each, which shall be numbered from No. 1, in arithmetical progression, and distinguished by the number to be applied to the same; "and the said shares shall be and are hereby *vested in the several parties taking the same, and their several and respective successors, executors, administrators, and assigns*, to their proper use and benefit, proportionably to the sum they shall severally contribute; and every person and corporation, and their several and respective successors, executors, administrators, and assigns, *who have subscribed or shall severally subscribe for one or more share or shares*, or such sum or sums as shall be demanded in lieu thereof, towards the said undertaking, and other the purposes of the said subscription, shall be entitled to and receive in proportionable parts, according to the respective sums so by them respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same shall be divided by the authority of the act."

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Section 122 gives the right of voting at general meetings to "every person and corporation *who shall have duly subscribed for or become entitled to any share.*" And by s. 145 it is enacted that the Company shall, at their first or some subsequent general meeting, cause "the names of the several corporations, and the names and additions of the several persons who shall *then be* or who shall from time to time thereafter become *entitled to shares* in the said undertaking, with *the number of shares they are respectively entitled to*, and the amount of the subscriptions paid thereon, and also *the proper number* by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made to cause their common seal to be affixed thereto; and the said Company shall from time to time cause a certificate or ticket with the common seal of the said Company affixed thereto to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking."

The Company is also required, by s. 147, to keep a book of the places of abode of the several proprietors. By the next section (s. 148) provision is made for ascertaining who the proprietors are, in case of any dispute, in these words: "That, in all cases where the right of property in any share in the said undertaking shall pass from any proprietor thereof to any other person or corporation, by any other legal means than by a transfer or conveyance thereof duly made and executed as herein directed, a declaration shall be made in writing stating the manner in which such share shall have been passed to such other person or corporation; and such affidavit or affirmation shall be transmitted to the Company, who shall enter the new proprietor's name in their book." "And before such declaration shall have been transmitted and such entry made, no person to whom such share shall have passed shall be entitled to partake of the profits or enjoy any of the privileges of a proprietor;" with particular provisions in reference to

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the case of female proprietors marrying and the death of any proprietor.

The sections that regulate calls on shares are, s. 149 and some which follow it. The persons required to pay them are "the several parties who have subscribed or who *shall hereafter subscribe* for or towards the said undertaking, and they are hereby required to pay the sums of money by them respectively subscribed for or towards (probably omitting by mistake '*the said undertaking, or*') such parts or proportions thereof as shall from time to time be called for by the directors," &c. Then (*a*), after imposing some limitations in point of time and amount and notice, "the respective *owners* of shares in the said undertaking shall pay their rateable proportions &c., and if *any owner or proprietor* for the time being of any such share shall neglect so to do, the Company may declare the shares of such *owners* to be forfeited," &c.

The 152nd section prescribes the manner in which the Company may sue for calls, and is that upon which the present action is founded: "In any action to be brought by the said Company against *any proprietor for the time being* of any share in the said undertaking, to recover any money due and payable for and in respect of any call, it shall be sufficient to declare and allege that the defendant, being the proprietor of a share in the said undertaking, is indebted to the said Company in such sum as the calls in arrear may amount to, &c.; and on the trial it shall only be necessary to prove that the defendant was at the time of making the call a proprietor of a share in the said undertaking, and that the call was made, &c.; and, in order to prove that the defendant was a proprietor of such share in the said undertaking, the production of the book in which the said Company is by this act *directed* to enter and keep the names and addresses of the several proprietors

(*a*) Sect. 150. These two sections have not been set out at length, being sufficiently quoted in the judgment.

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from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations *who shall from time to time become proprietors thereof or be entitled to shares therein*, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

The form of transfer is given in s. 155. It is to be by deed, which the Company are to keep, and enter a memorial of it in some book, indorsing the memorial with the entry; and until such memorial is entered the seller shall be held liable for future calls, and the purchaser shall have no share in the undertaking, no share in the profits, no vote at the meetings. The 223rd section, which prohibits the Company from taking land compulsorily before the whole sum of £600,000 shall have been subscribed for, was also referred to as throwing light on the argument, inasmuch as it recites, that, at the time of the act passing, £340,000 had been already subscribed for.

Applying the facts proved to these enactments, the learned counsel for the defendant (who was also defendant in error) argued—first, that the register book produced was not evidence, because it was kept in a manner by no means conformable to the act—secondly, that, if admissible in evidence, then the *primâ facie* case of ownership which it made out had been conclusively rebutted by the other facts proved.

I. As to the first of these propositions, it is to be observed that the book which by the 152nd section is made *primâ facie* evidence, is " the book in which the Company is by the act directed to enter and keep the names and additions of the several proprietors, with the number of shares, and their places of abode," &c. &c. Now, there is no book directed by the act to be kept which exactly corresponds with the book referred to in this 152nd sec-

tion. By s. 145, the Company are directed to keep a book in which they are to enter (*inter alia*) the names and additions of the shareholders, with the number of shares they respectively hold; but they are not directed to enter their places of abode. By s. 147, they are directed to keep another book, in which they are to enter the places of abode of the several proprietors from time to time. It thus appears that the act requires two books to be kept: one containing (*inter alia*) the *names* and *additions* of the proprietors, with the *number of shares* they are respectively entitled to; the other containing only the true account of *the places of abode* of the proprietors.

To what book, then, does the 152nd section refer when it speaks of *the* book directed to be kept, containing *names, additions, number of shares,* and *places of abode?* We think it refers to the book in s. 145.

It is essential for the purposes of the action for calls, that the *names* and *number of shares* should be shewn in evidence: that appears from the book mentioned in s. 145, and not from that mentioned in s. 147. The places of abode can very rarely, if ever, be important in such actions. One of these two books must have been intended; and, as s. 145 is clearly sufficient to shew what is wanted to be shewn, and the other is not, we think the words in s. 152, as to the places of abode, must be rejected, as being in the nature of *falsa demonstratio, quæ non nocet* (*a*).

If, then, the book referred to in s. 145 be the book which by s. 152 is made *primâ facie* evidence, the next inquiry is, whether the book which was in fact produced was the book kept pursuant to the 145th section. Now, the evidence clearly shews it was the book *intended* to be kept under the provisions of that section. It contained the names and additions of all the persons whom *the Company supposed* to be the persons entitled to shares, together

(*a*) See the case of *The London and Brighton Railway Company* v. *Fairclough*, post 544.

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with the number of those shares, (though not in all cases the amount of subscription paid thereon), and also the proper number by which each share was distinguished; and the common seal was from time to time affixed, as required by the section.

This appears to us, on principle, as well as on the authority of *The Southampton Dock Company* v. *Richards* (*a*), to be a sufficient compliance with the act to renderthe book admissible.

It was argued that the book produced contained the names of many persons not entitled, and omitted the names of whole classes who were entitled, and therefore ought not to be received; but, if the book is only made admissible in evidence when the Company can shew that the persons whose names are entered therein were the persons actually entitled to be so entered, then the provision in the 152nd section making the book admissible would be almost nugatory. For these reasons we think the book was *primâ facie* evidence. The allegation that the book had been improperly kept, by reason of the possible omission of the seal to some of the later entries in the first thousand numbers, appears to us quite immaterial. Supposing that to be as suggested, it only shews, that, as to some entries (certainly not as to any of those in question) the book was not *perfect*: it does not tend to shew it erroneous, and even if it did, we do not think it would prevent its admissibility, provided it is a book kept *bonâ fide* with the intention of doing what the act directs; and in essentials complying with its directions. The provisions of the act as to all the details to be included in the book are clearly to a great extent merely directory.

II. Supposing, then, the book to be admissible in evidence to shew a *primâ facie* case, then arises the second question—do the facts conclusively rebut this *primâ facie* evidence? We think they do not.

(*a*) Ante, p. 215; S. C., 1 Scott's N. R. 219; 1 M. & Gr. 448.

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The argument was that no others than the original subscribers, or those to whom they might have made over their shares since the passing of the act by the means thereby prescribed, ought to have been registered: whereas many, including the defendant, were registered, who had before the act made purchases of their shares from the original subscribers, receiving scrip-certificates from them in respect of such purchases, and bringing these certificates to the secretary as vouchers for their ownership. The transfers thus made were said to be altogether illegal according to the doctrine laid down by Lord *Tenterden*, C. J., in *Josephs* v. *Pebrer* (*a*), and to the cases of *Duvergier* v. *Fellowes* (*b*), and *Blundell* v. *Winsor* (*c*). We may observe that that doctrine was not necessary for the decision of the first-mentioned case then before the Court: nor will it be necessary for us now to investigate its soundness on general principles, or decide on the extent of its application, if it shall turn out that Parliament, in the act for forming this Company, has in fact given its sanction to the transfers of shares which had actually taken place at that time. The other two cases fall extremely short of *Josephs* v. *Pebrer*.

In this case the evidence proved that original subscribers who had paid their deposit, obtained the bankers' receipt for their money; that such persons producing their receipts at the office might obtain scrip-certificates in exchange for them; and that such certificates were commonly sold in the market to the amount of many thousands.

While this course of dealing notoriously prevailed, the Company obtained their act, with its recital that a very large sum had been already subscribed for. We cannot suppose Parliament to have been ignorant of the manner in which these subscriptions had been made and the transfer of shares negotiated; and, if the intention was, to allow none to be proprietors but such as had originally been sub-

(*a*) 3 B. & C. 639; 5 D. & R. 542; 1 C. & P. 341, 507.

(*b*) 5 Bing. 248; 2 M. & P. 384.

(*c*) 8 Simons, 601.

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scribers, it could not have failed to appear distinctly. Instead of this, the various clauses already quoted shew the most lax employment of all the phrases by which property in the undertaking could be described out of the most popular vocabulary. These expressions are not designedly varied according to the subject-matter of the respective clauses, but arbitrarily and indiscriminately used as all bearing the same import. The clause 149 fixes liability on those who have subscribed or *shall thereafter subscribe.* Now, it is clear that purchasers of shares in the statutable form were intended to pay the calls; but it is equally clear that those purchasers do not subscribe in the strict sense of the word. The calls are to be made on *proprietors;* the proprietorship is to be proved by production of the book; and the book is to contain the names of all who are and from time to time shall be entitled to shares.

Taking all these things into consideration, the Court cannot doubt that all are made liable to pay calls, who, having before the passing of the act become entitled by the then well-understood method of transfer, were afterwards registered as shareholders.

There is no principle of law preventing the Company, when they came to make up the register book, from treating the then holders of scrip-certificates applying for shares as the parties really contributing towards the 600,000*l.*, which the Company was by the 3rd section authorized to raise. It was the manifest intention of the original subscriber that the holder of his scrip-certificate should be treated as his assignee, and be registered accordingly as a shareholder. And we see nothing in the provisions of the act, or in any general principles of law, to prevent this intention from being carried into effect.

We do not therefore find it necessary to rely on the suggestion that this defendant may have become a proprietor by bankruptcy or other legal means before the

making up of the books. We decide this case on the broad ground that the book was, for the reasons we have stated, admissible as *primâ facie* evidence that the defendant was a shareholder, and that this *primâ facie* evidence was not rebutted by shewing that White, and not the defendant, was the original subscriber in respect of the shares in question.

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Other incidental points arising in the course of the argument were observed upon and disposed of by the Court.

Judgment for the plaintiffs.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1841.

ROUCH (Assignee &c. of *H. L. Orton* and *E. Paxton*, bankrupts) *v.* THE GREAT WESTERN RAILWAY COMPANY. *Jan.* 12.

TROVER.—The declaration stated, that Orton and Paxton, before they became bankrupts, to wit, on the 1st of April, 1837, were lawfully possessed as of their own pro-

A contract between a Railway Company and a builder contained a clause, that in case the latter should become insolvent, or be declared bankrupt, or should from any cause whatever, other than the act of the Company, &c., be prevented from proceeding with the works, it should be lawful for the Company to give him a notice in writing requiring him to proceed with the works, and that in case he should for seven days after such notice make default, it should be lawful for the Company to employ other workmen &c., and that all the tools and materials delivered for the purpose of the works thereby contracted for, and then being upon and about the site thereof, should, upon such default become, and be in all respects considered as the absolute property of the Company. The Company gave notice to the contractor on the 11th of April; on the 17th he committed an act of bankruptcy, and on the 18th they entered upon the works:—*Held*, in an action of trover brought by the bankrupt's assignee against the Company for the tools and materials which were on the works on the 17th, that he was entitled to recover them.

A letter written by the contractor, in which he stated that he was absent from home, to avoid two writs, *held* admissible evidence of an act of bankruptcy on the day of the date, although there was no other evidence of the writs being issued or other pressure by creditors.

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perty, of certain goods and chattels, to wit &c., to wit of the value of £10,000, and being so possessed thereof, the said O. and P. afterwards, and before they became bankrupts, to wit, on &c., casually lost the same. (The declaration then averred a finding and conversion by the defendants). To the damage of the plaintiff as assignee, &c.

Pleas, 1.—Not guilty; 2. That the said goods and chattels were not the property of the said O. and P., or either of them; 3. That they were not the property of the plaintiff as assignee as aforesaid. Issues on all the pleas.

On the trial before Lord *Denman*, C. J., at the *London* sittings after *Trinity* Term, 1838, the facts of the case appeared to be as follows:—

The plaintiff was the assignee (under a fiat of bankruptcy issued June 20th, 1837) of Messrs. Orton and Paxton, builders &c., who had entered into a contract with the Great Western Railway Company for the execution of certain works connected with that railway, being the sinking of seven shafts for a tunnel at Box. This contract was by indenture, dated February 25th, 1837 (*a*), witnessing, (amongst other things), that (*b*) in case the contractors shall become insolvent, or be declared bankrupts, or shall from any cause whatsoever, other than any arising from the act of the Company, their engineer, or authorised agents, be prevented from or delayed in proceeding with and completing the works, according to this present contract, or shall not commence or proceed in the works to the satisfaction of the Company, it shall be lawful to and for the Company, if they shall think fit, to give, or cause to be given, or left with or at the usual place of abode of the contractors or their sureties, or any or either of them, a notice or notices

(*a*) See a similar contract set out fully in *Ranger* v. *The Great Western Railway Company*, ante, Vol. i. p. 2. (*b*) Clause 23.

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in writing, either under the common seal of the Company, or signed by two of the directors thereof, requiring them the contractors to enter upon and commence, and regularly proceed with the works, and that in case the contractors shall, for seven days after such notice given or left, make default in commencing or regularly proceeding with the works, it shall and may be lawful to and for the Company to employ any other respectable workman or workmen either by contract, or measure and value, or otherwise, to proceed with the works, and to complete the same; and pay or cause to be paid to the said workman or workmen the amount of his or their charges for the same, and for all necessary materials, tools, utensils, engines, and machinery to be found and provided for such completion, out of the money which shall be then remaining due to the contractors on account of this contract.

And further (*a*), that the monies which, previously to such default, shall have been paid to the contractors on account of any work or materials then already done or executed or provided by the contractors, shall be considered as the full value, and be taken by the contractors in full payment and satisfaction, not only of and for the work in respect of which payment may have been made, but likewise of and for any other work and materials which the contractors shall have then done, executed, or provided, although no such payment may have been previously made in respect thereof.

And further (*b*), that all the balance and monies whatsoever which then or thereafter would have been or become due or payable to the contractors under this contract, if this present clause had not been inserted, together with all the tools and materials then delivered for the purposes of the works hereby contracted for, and then being upon or about the site of the works, shall, upon such default as

(*a*) Clause 24. (*b*) Clause 25.

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aforesaid, become and be in all respects considered as the absolute property of the Company.

And further (*a*), that all materials brought and left on the site of any works to be done under this contract by the contractors, or by their order, for the purpose of being *permanently* used in or about the works, shall, from the time of their being so brought and left as aforesaid, be considered as the property of and belonging to the Company, and shall not on any account or pretence whatsoever be taken away by the contractors, their executors and administrators, or any other person or persons whomsoever, without the special licence and consent of the Company; but the Company shall not be in anywise answerable or liable for any loss or damage which may happen to or in respect of the said materials, either by the said materials being lost, stolen, or injured by weather, or otherwise howsoever."

The contractors commenced the works in November, 1836, but in April, 1837, in consequence of their not proceeding satisfactorily, the Company thought it necessary to resort to the powers contained in the contract. Accordingly a notice (under clause 23) was, on the 11th of April, served upon each of the contractors, stating that the works were not proceeding to the satisfaction of the principal engineer, and requiring them to proceed, in terms of the contract, within seven days after, that in default thereof the Company would themselves proceed with the works. Up to this time, it appears, there had not been any act of bankruptcy; it was contended, however, that one was committed by Paxton before the 18th of April, the last of the seven days mentioned in the notice; after which the same foreman and workmen continued on the works.

On the 20th of April it was found requisite to have additional materials for the works, and accordingly orders

(*a*) Clause 27.

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were given to the different tradesmen, countersigned by one of the assistant engineers (Mr. Glennie), with notice that orders so countersigned would be guaranteed and paid for by the Company.

At this time, the contractors had a superintendent (Beckers) on the works, by whom the orders for materials had been generally signed; those countersigned as above were also made out and signed by him. It was the practice to pay the workmen's wages every fortnight; and, on Saturday, April 22nd, Glennie paid them for the preceding fortnight out of funds supplied him for the purpose by the Company. Up to, and including the 19th, (the day on which the notice expired,) he paid them in the name of the contractors, and for the other two days in that of the Company. On the 20th of June a fiat in bankruptcy issued against the contractors: and, on the 28th, Orton and another man went on the premises to take an inventory of the effects, but were ordered off by Glennie. A notice was thereupon affixed to the premises, by the messenger under the fiat, that he had that day taken possession of all the tools, implements, and materials used by the contractors, and cautioning all persons from using or removing them: and, on the 22nd of August, the plaintiff, as assignee, made a formal demand of the same, and afterwards brought this action to recover the materials, tools, and plant, which he claimed as having belonged to the bankrupts at the time of their bankruptcy, left on the premises of the Company, and by them converted to their own use. The Lord Chief Justice left it to the jury to say whether they thought there was a default by the contractors, and if so, whether there was a compliance with the notice after it was given. The jury found that the acts of bankruptcy had been committed by Paxton on the 12th, and Orton on the 17th of April; that the works were suspended by the acts of the contractors sufficiently to warrant the defendants' notice, and that such notice was

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not complied with. Verdict for the plaintiff, with leave to the defendants to move to set aside the verdict, and, instead thereof, to enter a nonsuit, or a verdict for the defendants. In Michaelmas Term, 1838, Sir *W. W. Follett* obtained a rule *nisi* accordingly, on these, amongst other (*a*) grounds: 1st, that, admitting the acts of bankruptcy to have taken place before the 18th of April, when the seven days' notice expired, the Company had contracted, and rightly so, independently of the notice, that, in case of bankruptcy, the contract should be at an end, and the materials become their property. 2ndly, that if, under the pleadings, that part of the contract vesting the materials in the Company, in the event of bankruptcy, should be held void, there was no conversion by the Company, because they had a right under the contract to use the materials to complete the works.

Sir *J. Campbell*, Attorney-General, *R. V. Richards*, and *Helps* shewed cause (*b*). First, this contract, which makes certain property pass to a particular creditor, is contrary to the policy of the bankrupt laws. It provides that, in case the contractors become bankrupts, *eo instanti* all the money due to them shall be forfeited; therefore, the Company have only to keep a large balance in hand, and all the other creditors would be defrauded. By this contract also, all the materials and implements become the property of the Company; that is, the Company are not only to be relieved from loss, but to acquire property. *Wilson* v. *Greenwood* (*c*) is a strong intimation that such a contract

(*a*) The other grounds related to the reception of a letter as evidence of the act of bankruptcy (see *Ridley* v. *Gyde*, 9 Bing. 349), and other points, which are not material to the purpose of these reports, and being fully referred to in the judgment are omitted in the argument.

(*b*) February 5th, 1840, before Lord *Denman*, C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

(*c*) 1 Swanst. 471.

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could not be carried into effect; many cases are there cited, the general inference to be drawn from which is, that the owner of property may, on alienation, qualify the interest of the alienee, by a condition to take effect on bankruptcy, but cannot, by contract or otherwise, qualify his own interest, by a condition which is to determine or control it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law. *Roe* d. *Hunter* v. *Galliers* (*a*), was decided on the same principle. In *Tripp* v. *Armitage* (*b*), Lord *Abinger*, C. B., says, "Supposing these to be manufactured goods, and in the possession of the bankrupt at the time of his bankruptcy, the question is, whether the contract he has made that such goods shall become, in case of his bankruptcy, the property of other parties, if they so choose, is a binding contract on his assignees. I think it is not. The bankrupt has no power to make a contract, which, after his bankruptcy, shall vest in other persons the property which, upon his bankruptcy, vested in his assignees. At the moment of the act of bankruptcy the assignees are entitled to all he was then possessed of; and yet it is not until then that the defendants are to exercise an option whether they will take the property or not." That case would apply to the present, supposing bankruptcy alone was the condition of transferring the property: but this is not so, for here seven days' notice is requisite; if, therefore, this be a valid contract, and notice is by it required to be given, the transfer of property can only take place at the expiration of the seven days. The notice was given on the 11th of April, and expired on the 18th; on the 17th, Orton committed the act of bankruptcy; *then* the property shifted to the assignees, and became vested in

(*a*) 2 T. R. 133. (*b*) 4 M. & W. 687.

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them, and not in the Company. Therefore, whether the contract was lawful or unlawful, there was no change of property.

But the Company contend they have a lien. The materials have, indeed, been worked up, and the tools used, but there is no clause in the contract justifying such use of these articles after the bankruptcy. [Lord *Denman*, C. J.—The assignees may be bound by the bankrupts' contract to allow the goods to remain there.] There is no clause, except the one requiring the seven days' notice; and independently of the goods delivered on the premises before the 17th, there were some articles brought there by the contractors after that day, furnished by their order, and delivered on their credit, though on the guarantie of the Company. These, being brought after the bankruptcy, must have been the property of the assignees, and could not be affected by the contract. There are three descriptions of property in this question: 1. The materials brought on the premises before the bankruptcy to be used *permanently;* 2. Tools and implements, which would revert; and 3. Articles brought there after the bankruptcy, with respect to which there can be no answer to the claim of the assignee; for the conduct of the Company as to the orders given in May, if not a waiver, was a proceeding which left the goods in the order and disposition of the bankrupts. The fact of their guaranteeing the payment made no difference; if they were in that order and disposition since the forfeiture, they must be taken to have been so when it accrued.

Then, whatever might be the right of the Company to use the materials of a *permanent* character, it would not apply to the second class, the tools and implements; there is no lien on that property; it was in the bankrupt, is in the assignee, and there is not only a refusal to give up those articles, but a use of them amounting to a conversion.

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Sir *W. W. Follett* and *Talbot*, contrà.—The defendants are entitled to have a nonsuit entered if they succeed in either of the points in this case. This is an action brought under a joint *fiat*, and the question is, whether the assignee is entitled to maintain it. Supposing there was an act of bankruptcy sufficient for this purpose, what is the effect of this contract? Its precise nature is, that the Company, in proceeding with their works, find it necessary to make a tunnel, and contract with these persons for that purpose. The evidence shewed that the intention was, that the work, once begun, should be regularly continued without removing the materials; that being so, they enter with a *bonâ fide* object into a contract to that effect with persons then able and willing to contract. This is not like the case of a marriage settlement, where a man may contemplate bankruptcy; for here, if the bankrupt had previously leased his property for a term of years, he would have a perfect right to enter into such a contract, and his assignees would be bound by it. These are cases which turn on the contemplation of fraud. Assignees must take property subject to such contracts, if legal; and if this is so, they are bound by it, and cannot take the goods out of their present possession. In *Tripp* v. *Armitage* (*a*), no judgment was given on this point, therefore the expressions cited from that case were extra-judicial. It is very important that these Companies, whose object is to secure the performance of their works, should not have them stopped by such causes. [Lord *Denman*, C. J.—But does not this contract go further, when it imposes a forfeiture of tools, materials, and balance due?] In some degree it may be so, but not for the purposes of this action. Here there are three distinct classes of work: 1. Permanent, as timber, stone, lime, &c.; 2. Fixed, (which is also a species of permanent work), as

(*a*) 4 M. & W. 687.

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the frame work used in the shafts during excavation, and which it would be impossible to remove till the work was finished; and, 3. Tools. The question is, whether a contract passing the right of property in these articles to the Company is legal; and, if not, whether they are not entitled to retain them till the works are completed. The agreement was, that all things necessary to the work should be continued; if then the assignee is not entitled to the property, trover cannot lie. This was a demand made while the work was completing. [*Coleridge*, J.—As to the detention, do you rely upon your plea of "not guilty?"] Yes, and that of "no property," under which you may give evidence of lien. *Owen* v. *Knight* (*a*). This is a denial of conversion which refers itself to the original possession, and by which the plaintiff's right is distinctly put in issue. *Isaacs* v. *Belcher* (*b*), *Samuel* v. *Morris* (*c*).

With regard to the goods last supplied, they were ordered and paid for by the Company, and never were the property of the contractors; their contract was at an end; and, although they ordered these things in their own names, they acted merely as the agents of the Company. Those goods, therefore, never could be the property of the assignee. As to the materials and permanent property prior to the bankruptcy, they became the property of the Company under the contract, by an express clause which, independently of any default, provides that these should vest in the Company, without reference to either bankruptcy or insolvency. *Woods* v. *Russell* (*d*), since confirmed by the case of *Clarke* v. *Spence* (*e*), shews that trover will not lie for those things which are affixed to the soil; to which description, in this instance, the only conversion *de facto* applies. The other goods are of two classes, those sup-

(*a*) 4 B.N.C. 54; 6 D. P. C. 244.
(*b*) 8 C. & P. 714; 5 M. & W. 139; 7 D. P. C. 516.
(*c*) 6 C. & P. 620.
(*d*) 5 B. & A. 942.
(*e*) 4 A. & E. 448.

plied before and since the bankruptcy; the last were paid for with the Company's money, as the first may be said to be by their instalments; and they, therefore, have a lien upon them. *Crowfoot* v. *The London Dock Company* (*a*). As to the rest, of whatever nature, timber, materials, or tools, it was essential to the safety of the work that it should go on continuously, and therefore they had a right to keep them on the premises. With respect to *Wilson* v. *Greenwood* (*b*), Lord *Eldon*, C., says of the deed there in question (*c*), "I have no doubt, from the face of it, that it was made, in a strict sense, in contemplation of bankruptcy;" by which, therefore, that case is distinguishable from the present.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—The motion in this case was for leave to enter a nonsuit or verdict for the defendants in an action of trover. It was rested on two grounds; first, that in respect of the bankrupt Orton, the act of bankruptcy, on which it was necessary for the plaintiffs to rely, was proved only by inadmissible evidence; secondly, by the contract between the bankrupt and the defendants the property in the articles for which the action was brought had passed to the defendants. It was important for the plaintiff, for a reason which will appear hereafter, to prove an act of bankruptcy committed before the 18th of April, and, with respect to one of the bankrupts, this was done in part, by the production of a letter written by him and bearing date the 17th. It was the reception of this letter which was objected to.

The bankrupts were contractors with the defendants for making a tunnel through Box Hill, in the county of Wilts,

(*a*) 2 C. & M. 637. (*b*) 1 Swanst. 471. (*c*) p. 482.

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By the contract it had been provided, in case the contractors should become insolvent, be declared bankrupts, or from any cause not referable to the defendants, should be prevented from, or delayed in proceeding with and completing the works, the defendants might give a notice requiring them to do the same, and if they neglected to comply with this for seven days after notice, the defendants might themselves proceed with the works; in which case the monies already advanced for that work, or materials already done or provided by the bankrupts, were to be considered as a full payment for all work done or materials then provided; and the balance due, as well as the tools and the materials then delivered and provided for the purpose of the work, should become absolutely the property of the defendants.

A delay had occurred in the prosecution of the works, and the defendants, availing themselves of those clauses, had given a notice on the 11th of April which would expire on the 18th.

The bankrupt Orton had left his home on the 17th and gone to London, where Mr. Brunell the engineer resided, with whom it might be necessary for the bankrupt to confer on matters relating to the prosecution of the works. On the same day he wrote the letter in question to the Bristol solicitors of the defendants, and stated in it, "I am now in London to avoid two writs."

It was objected, that there was no evidence of any pressure, nor of any writ having been sued out against him; that the expressions therefore amounted to a mere declaration of the bankrupt, and that such had never been received against third persons. But we have no doubt that this letter was properly received. The plaintiff was in the course of proving an act of bankruptcy, by departure from the dwelling-house, or otherwise absenting himself, with intent to defeat or delay creditors. The act and intention were both necessary to be proved, and when

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the act has been proved by extrinsic evidence, it has been settled by cases so numerous and familiar that they are not necessary to be quoted, that the intent with which the act was done may be proved by the declaration of the bankrupt.

The principle of the admission is, that the declarations are *pars rei gestæ*, and therefore, it has been contended, they must be contemporaneous with it; but this has been decided not to be necessary, and on good grounds, for the nature and strength of the connection with the acts are the material things to be looked to; and although the concurrence of time cannot but be always material evidence to shew the connection, yet it is by no means essential; what, therefore, the bankrupt said immediately on his return home, as to the place where he had been and his motive in going, was held admissible in *Bateman* v. *Bailey* (*a*); and in *Ridley* v. *Gyde* (*b*), to which we were referred by the counsel for the defendants as a leading authority, the act to which the declaration referred, and which was not a continuing act, but merely giving a security, was done on the 25th of October, the declaration itself which was held admissible was made on the 20th of November. There the Court seem to have adopted the rule which *Park*, J., had laid down in *Rawson* v. *Haigh* (*c*), that it is impossible to tie down to time the rule as to declarations; if there be connecting circumstances, a declaration may even at a month's interval form part of the whole *res gesta*. In that case of *Ridley* v. *Gyde*, the Court thought the conversation of November 20th was, under the circumstances, no more than the resumption of a conversation broken off on the 25th of October, which immediately preceded the giving the security in question.

In the present instance, however, there is no necessity to rely on that case, because the absenting himself from

(*a*) 5 T. R. 512.
(*b*) 9 Bing. 349; 2 M. & Scott, 448.
(*c*) 2 Bing. 99.

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home by the bankrupt was a *continuing* act, and the letter was written during its *continuance*. If his declaration made immediately on his return would have been admissible, that which he writes during his absence cannot on any reasonable principle be rejected.

But it was said this was objectionable on another ground, the want of proof *aliundè*, that in fact any writs had been issued against the bankrupt, or any pressure used against him. If it be essential, indeed, to the validity of the act of bankruptcy, that there should have been one or the other, the objection must prevail; because the bankrupt's declaration could not be evidence of those facts, and none other was offered. The same objection was made in *Newman* v. *Stretch* (*a*), and overruled by *Park*, J., who said that his impression was, that it was unnecessary to give evidence beyond the transaction itself, either that there were creditors, or that the creditors had been delayed. That indeed was only a decision at *Nisi Prius*, and the course that case took made it impossible to review it; but we think *Ex parte Bamford* (*b*), and *Robson* v. *Rolls* (*c*), fully support that ruling of the learned Judge.

In the former case the debtor quitted his house to avoid two men, bailiffs, whom he supposed to have a writ with them to arrest him; but in fact they had none. Lord *Eldon*, C., said,—"The circumstance that Plowman and Hartley had no writ with them, is to this point (that is, the commission of an act of bankruptcy) immaterial, if, knowing the officer has the writ, the defendant departs under a chimerical belief he has it with him, but with the intention of delay, the act of bankruptcy is complete." In that case, it is true, there was a writ out against the debtor, and Lord *Eldon*, C., mentioned that circumstance, not, we think, as necessary to complete the act, or that the belief the officer had the writ, that is, that there was a credi-

(*a*) M. & M. 338. (*b*) 15 Ves. 449. (*c*) 9 Bing. 648.

tor to delay, was essential in order to make out the intent to delay; but all that the statute requires is the act of departure, or absenting with that intent; the *actual* delay of any creditor is immaterial: *Robertson* v. *Liddell* (*a*). As to which Lord *Ellenborough*, C. J., said, in *Chenoweth* v. *Haigh* (*a*), it had been decided that the intent, and not the actual delay, was what the statute meant, and the moment the Court have determined *that*, it becomes immaterial whether there was a possibility or not of delay.

In *Robson* v. *Rolls* (*b*), the debtor believed there was a writ out against his person, and abstained from going out of London into Middlesex, as he thought to avoid being arrested; but there was no such writ issued, the creditor having proceeded only by *fi. fa.* We think, therefore, that to constitute an act of bankruptcy, neither writ nor pressure was in fact necessary. Of course the want of proof of them can be no objection; and this does not, as is alleged, reduce the evidence to merely a declaration by the bankrupt, unaccompanied by any substantive act; the substantive act proved *aliundè* is the departure from home. That is equivocal, but the declaration made during the continuance of that act shews the intention with which it was done. This objection, therefore, falls to the ground.

Next, it was contended for the defendants, that if a valid bankruptcy was established, the property in the articles sought to be recovered had passed to them, by virtue of the clauses before cited; and a great deal of argument was urged, and many cases cited on both sides for and against the validity in law of the agreement contained in it; but upon that we do not think it necessary to express any opinion, because the bankruptcy having occurred on the 17th, before the bankrupt had committed any default within the meaning of those clauses,—before, therefore, the defendants could act on them, and take possession,—the

(*a*) 9 East, 487. (*b*) 1 M. & S. 676. (*c*) 9 Bing. 648.

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operation of them was intercepted, even if they were legally valid in their first formation.

The 23rd clause affects the construction of those which follow—"If the contractors shall become bankrupt or be declared insolvent, or be prevented from or delayed in proceeding, it shall be lawful for the Company, if they shall think fit, to give a notice requiring them to proceed, and if for seven days after they shall make default in proceeding, then the Company may employ other workmen and proceed themselves." The right to use the materials and the tools, and the vesting of the property in the defendants, are both dependent on an election to be made by them after the default made by the contractors, and that default is the neglecting to proceed for seven days after the notice given. On the sixth day no default had been made. The defendants on that day could make no election, and could not enter. The property did not vest in them; but on that day, by relation, the title of the assignees was completed.

This case, therefore, falls within that of *Tripp* v. *Armitage* (*a*), with which we agree; and it is probable the clause has been framed in this way rather than in the more simple form by which the property should have been made to pass to the Company at once, in case of insolvency or bankruptcy, to avoid the question which would have arisen on its validity with respect to the insolvent and bankrupt acts. But this care thus exercised, has, under the circumstances, let in the difficulty on which this case will now be decided.

There was a delay in the proceeding, a notice was given accordingly, and before the time limited had expired, and the forfeiture, if we may so call it, had accrued, the goods had ceased to be the bankrupts', by the title of the assig-

(*a*) 4 M. & W. 687.

nee having intervened; the subject matter of forfeiture, therefore, was removed. Our judgment will, therefore, be for the plaintiff, and the rule will be discharged, subject to the allowance for such articles (if any) as the defendants purchased and brought to the work after the bankruptcy.

Rule discharged (*a*).

(*a*) See *Hawthorn* v. *The Newcastle-upon-Tyne* and *North Shields Railway Company*, antè, p. 288.

COURT OF EXCHEQUER.

In Hilary Term, 1841.

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Jan. 15.

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By a Railway Act (7 Will. 4, c. xxi, s. 115), it was provided that the directors should have power from time to time to make such calls from

DEBT for calls.—The declaration (following the form given by the act 7 Will. 4, c. xxi, s. 118) stated that the defendant, at the several times of making the several calls thereinafter mentioned, and from thence continually to the commencement of this suit, was a proprietor of twenty

the proprietors of shares as they from time to time should find necessary, with an interval of three calendar months at the least between each call, and twenty-one days' notice of each by advertisement, and that the proprietors of shares should pay the sums of money subscribed for to such person at such time and place and in such manner as the said directors should from time to time direct or appoint. The directors made a resolution, on the 13th of March, "that a call *shall be* made on the 30th of March to be paid on the 1st of May." The resolution did not state the place where, nor the person to whom payment was to be made, but the advertisement of notice inserted in the newspapers did contain those particulars. In an action against a defendant, a proprietor at each of the three dates, and no evidence being given of any change in the directors during that time:—*Held*, that the directors might fix the time, place, and manner of payment after the original resolution had been made, and by a distinct act.

And that the call was not invalid, from the resolution being prospective.

Section 150 provided, that if any director should directly or indirectly be concerned in any contract with, or hold any office or place of trust or profit under the Company, he should be thereby discharged from the direction:—*Held*, that this clause related to contracts with the Company in execution of their undertaking, and did not disqualify those directors who were also members of a bank employed by the Company.

By section 159 it was enacted, that the orders and proceedings of the meetings of the Company should be entered in a book, and signed by the chairman of the meeting, and should be allowed to be read in evidence without proof of the meeting having been duly convened, or of the persons making such orders &c. being proprietors or directors, or of the signature of the chairman, "all of which shall be presumed:"—*Held*, that it was not necessary to prove that a signature "W. S., deputy chairman," was signed by W. S., or that he was deputy chairman, and presided at the meeting.

Where a defendant, on purchasing his shares, received a transfer with a blank for the name of the purchaser, and stating the consideration untruly, which however he forwarded to the secretary with a claim to be registered as proprietor:—*Held*, that having made such representation to the Company as to induce them to register him, he was precluded by his representation from objecting to the transfer.

And that a transfer of shares from an original subscriber, after the passing of the act, is good, although made before the sealing of the register of proprietors, and although the original subscriber be never registered as a proprietor.

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shares in the undertaking, and was indebted to the Company in the sum of £450, for four calls of 2*l.* 10*s.*, 5*l.* 5*s.*, and £10 respectively, whereby &c. Pleas, 1. *Nunquàm indebitatus.* 2. That at the time of making the calls, he the defendant was not a proprietor of the said shares in the said undertaking, *modo et formâ*, on which issue was joined.

At the trial before *Rolfe*, B., at the Liverpool Summer Assizes, 1841, it appeared that the first general meeting of the Company was held the 27th October, 1837, at which sixteen directors (thirteen of whom were named in s. 152, as the first directors) were elected. Three of these, one of whom was Mr. Sidebottom, the deputy chairman, were partners in the Liverpool and Manchester District Banking Company, which Company had been appointed by the directors, and had acted as the bankers and treasurers of the Railway Company ever since its formation. In that capacity they were used to receive and give receipts for calls, and pay money on cheques signed by three directors, the clerk, and secretary. The seal of the Company was not affixed to the register of proprietors (as required by section 110) until February, 1838. The shares in question were transferred to the defendant in December, 1837, by Messrs. Leeds, brokers, of Manchester, who had been parties to the original subscription deed of the Company. The transfer was delivered to the defendant, with a blank for the name of the purchaser. It stated that the consideration was 18*l.* 15*s.*, or 18*s.* 9*d.* *per* share; whereas it was proved that the sum really paid was £20, or £1 *per* share. The defendant, on receiving the transfer, signed a proxy paper (as required by section 120), and forwarded it to the secretary, and his name was accordingly entered in the register as the proprietor of the shares.

The resolution of the directors for the first of the calls which were the subject of this action, was made on the 13th of March, 1839,—"That a call of 2*l.* 10*s.* per share *shall be made* on the 30th of March, payable on the 1st of

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May next." The other three calls were made subsequently payable on the 6th August, 1839, the 1st of January, and 1st of May, 1840. All the resolutions were signed "W. Sidebottom, Deputy Chairman;" but there was no evidence that he presided as such at the several meetings when they were made. None of them specified the place where or person to whom payment was to be made; but the notices signed by the clerk and secretary, "by order of the directors," and inserted in the newspapers, as required by the act, stated, that the directors having resolved to make a call for £ per share, the proprietors were required to pay the said call on or before &c. to certain bankers; amongst others, to the Manchester and Liverpool District Bank. Several objections were taken for the defendant at the trial, all of which the learned Judge reserved for the opinion of this Court, and a verdict was taken for the plaintiffs for the full amount claimed. In *Michaelmas* Term *Cresswell* accordingly moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had, on the following points (*a*):—He objected, 1. That the book con-

(*a*) The clauses of the act, referred to in the argument, are as follows:—

Section 110 requires the Company, from time to time, as occasion may require, to cause the names and additions of shareholders, with the number of their shares and their distinguishing numbers, and amount of subscriptions paid thereon, to be entered in a book, and after such entry made to cause their common seal to be affixed thereto, and to deliver a certificate, which is to be *primâ facie* evidence of the titles of the proprietors, &c.

Section 113 requires "the subscribers &c. to pay the sums of money by them subscribed or agreed to be paid, or such parts or proportions thereof as shall, from time to time, be called for by the directors of the said Company, under or by virtue of the powers of this act, at such times and places and to such persons as shall from time to time be directed by the said directors," &c. (Proviso for recovering the same in case of non-payment).

Section 115:—"The directors of the said Company shall have power from time to time to make such calls of money from the proprietors of shares in the capital stock of the said Company, who shall not have already paid the full amount due or payable in respect of their

taining the resolution, purporting to be signed by the deputy chairman, was inadmissible, without proof that Mr. Sidebottom actually presided at such meetings. [*Parke,*

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respective shares, to defray the expense of the said railway, and carry on the same, as they from time to time shall find necessary, so that no such call shall at any one time exceed the sum of £10 upon each share which any person or corporation shall be possessed of or entitled unto in the said undertaking; and that there shall be an interval of three calendar months at the least between each successive call, and twenty-one days' notice at the least shall be given of every such call, by advertisement in one or more newspapers, published or circulated in each of the counties of York, Derby, Chester, and Lancaster; and the several proprietors of shares in the capital stock of the Company shall, and they are hereby required to pay the sum or sums of money subscribed for or payable in respect or on account of their several and respective shares, or so much thereof as shall not have been previously paid up, by such calls or instalments, to such person, at such time, at such place, and in such manner as the directors of the said Company shall from time to time direct or appoint for the use of the said undertaking; and if any proprietor of any such share shall not from time to time pay the rateable proportion, or call, or instalment due in respect of each such shares to the person, and at the time and place in the manner to be appointed for payment thereof, as hereinbefore mentioned, then and in such case, and so often as the same shall happen, such proprietor shall pay interest for the amount which shall be so unpaid, after the rate of £5 per cent. per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid," &c.

Section 118, after giving a form of declaration in actions for calls, provides that, "on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such share or shares in the said undertaking as such action is brought in respect of, or some one such share; and that such notice was given as is directed by this act of such calls having been made; without proving the appointment of directors who made such respective calls, or any other matter or thing whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due (including interest computed as aforesaid) on such calls, unless it shall appear that any such call exceed £10 for every share, and was made within the distance of three calendar months from the last preceding call, &c.; and in order to prove that such notice was given as aforesaid, the production of such newspapers containing such advertisement, as by this act required, shall be *primâ facie* evidence that such advertisements were duly inserted

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B.—The effect of section 159 is, that the signature is to be presumed to be that of the deputy chairman.]

2. That the fact of Mr. Sidebottom and the two other

in such newspapers, and that such newspapers were printed and published respectively at the respective times they bear date, and by such printer, or printer and publisher, and at such places, and by such persons respectively as they purport to be printed, or printed and published by and at respectively."

Section 125 empowers "the proprietors of shares and their respective executors, administrators, and successors, by writing duly stamped, in which the consideration for the same shall be duly stated, to sell and dispose of any share or shares to which they shall respectively be entitled therein, subject to the rules and conditions in this act mentioned," and gives a form of conveyance.—"And on every such sale the *deed of conveyance* (being executed by the seller and purchaser of such share or shares) shall be kept by the clerk of the said Company," &c.

Section 127 enacts, "that no person or corporation shall sell or transfer any share, which he or they shall possess in the said undertaking, after any call shall have been made by the said directors for any sum of money in respect of such share, unless he or they, at the time of such sale or transfer, shall have paid the full sum of money which shall have been called for in respect of each share."

Section 150:—"That no officer of the said Company receiving a salary, nor any person concerned or interested in any contract with the said Company, shall be capable of being chosen a director of the said Company, nor shall any director be capable of accepting any other office or place of trust or profit under the said Company, or of being concerned or interested in any contract with the said Company during the time he shall be a director of the said Company; and if any director of the said Company shall at any time whilst such director, accept or continue to hold any other office or place of trust or profit under the said Company, or if any director or any secretary, clerk, treasurer, or other officer or servant of the said Company, shall, either directly or indirectly, be concerned in any contract with the said Company, or shall participate in any manner in any work to be done for or goods to be sold to the said Company, every such director &c. shall thereupon be immediately and is hereby discharged from the direction, office, service, or employ, of, in, or under the said Company, and rendered incapable of being thereafter employed by them, unless re-appointed, and such re-appointment be confirmed at some general or special general meeting of the said Company."

Section 152 enacts, "that sixteen persons therein named, and the survivors and survivor of them, or such of them as shall continue to act, shall be the first directors of the said Company, and shall con-

directors being members of the Banking Company, disqualified them from acting as directors, according to section 150, and that therefore these proceedings were invalid. [Lord *Abinger*, C. B.—The clause only applies to contracts with the Company in the execution of their undertaking.]

3. That the transfer to the defendant was void, both because a blank was left for the purchaser's name, *Hebblewhite* v. *McMorine* (*a*), and the consideration untruly stated. [*Parke*, B.—It is a rule of law, that when one party makes

tinue in office until the first general meeting of the said Company to be held in pursuance of this act; and they the said directors hereinbefore named shall and they are hereby required to fix the time and place of such first general meeting within the limits hereinbefore prescribed, and to give notice thereof in the manner hereinbefore directed as to the general meetings of the said Company; and until such first general meeting shall be holden, and that such directors *shall have been duly elected*, as hereinafter prescribed, the said directors hereinbefore named, or the survivors or survivor of them, or such of them as shall continue to act, shall and lawfully may allot the shares (if any) remaining undisposed of in the said undertaking as they the said directors shall think fit, and shall and may exercise all other powers and authorities which are by this act given to, or which may be exercised by the directors who may be elected in pursuance hereof at the first or at any subsequent general meeting of the said Company."

Section 153 empowers the directors to appoint a chairman and deputy chairman.

Section 154 provides, that, in the absence of the chairman, the deputy chairman shall preside at all meetings of the Company.

Section 159 enacts, that the orders and proceedings of all meetings, as well general as special general, of the said Company, and of the said directors, and of such committees respectively as aforesaid, shall be entered in some book or books to be provided and kept for that purpose, and shall be signed by the chairman of such respective meetings; and such orders and proceedings, when so entered and signed, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, and before all Judges, justices, and others; and that, without proof of such respective meetings having been duly convened, or of the persons making or entering such orders or proceedings being proprietors, or being directors, or members of the committee, or of the signature of such chairman, as the case may be, all of which last-mentioned acts shall be be presumed.

(*a*) Ante, p. 51; S. C., 6 M. & W. 200.

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a representation to another, by which the situation of the latter is altered, the party making such representation is bound by it.]

4. That the calls were not duly made, the election of the directors, on the 27th October, 1837, being void, not being made by *registered* proprietors.

5. That the person to whom, and place where payment was to be made, ought to have been specified in the *resolutions* for the calls.

6. That the first call was invalid, the resolution being to make a call *in futuro*.

7. That the transfer to the defendant was void, as being made by parties who were not *registered* proprietors.

The Court refused the rule on the first three grounds, but granted it on the last four; (the question ultimately turned only on the fifth and sixth).

Wightman (Sir *W. W. Follett* with him) shewed cause (*a*). 1. As to the objection that the election of the directors was not made by *registered* proprietors; it appears, by the Company's books, that, at every meeting in question, at least five of the original directors named in section 152 were present, which would, at all events, cure any irregularity in the proceedings in consequence of the election of the others. 2. It was not necessary that the resolutions should specify the place of payment, and person; that is only required to be stated in the advertisements giving the twenty-one days' notice required by section 115. See *The Great North of England Railway Company* v. *Biddulph* (*b*). [*Parke*, B.—It seems to me, that the notice in the newspapers, which amounts to a personal demand on the proprietors individually, is the call.] 3. There is no objection to the resolution for the call being prospective; the call was, in fact, made on the 30th of March, of which due

(*a*) Jan. 13th, before *Parke*, *Alderson*, and *Rolfe*, Bs.
(*b*) Antè, p. 401.

notice was given by the advertisement. 4. And the judgment in *The London Grand Junction Railway Company* v. *Freeman* (*a*), disposes of the last objection, as to the invalidity of a transfer made by unregistered proprietors.

Cresswell, *Dundas*, *Crompton*, and *Cowling*, contrà. 1. The calls generally were invalid; the time, place, and person of payment not being specified in the resolution. Section 115 requires that a call shall be made by the directors; that is done by their resolution: then that notice of the call *having been made* shall be given, which is done by the advertisement; that evidently refers to the resolution as the call. The fixing of the time and place of payment are matters too important to be delegated to the clerk, and ought to be the result of the judgment and discretion of the directors. This view is supported by section 113; it speaks of payment of such subscriptions as shall be called for by the directors, (that is, by their resolution), in such manner as shall be directed by them. Then section 118, which requires proof of the defendant being a proprietor at the time of making the call, and that notice of the calls was given him, evidently refers to two different things. And section 127 prevents the sale of shares after the calls shall have been made, until payment. All these clauses ought to be construed most strictly against the Company, who are bound to shew that all the proceedings under them are regular. If the resolution be the call, it ought to specify the time, place, and person to whom payment is to be made; if the advertisement be the call, all the preceding steps are only prospective and executory. 2. As to the first call, the resolution, upon the face of it, only imports that a call shall be made *in futuro*. The directors can have no power to resolve prospectively that a call shall be made on such a day, for, at the time of making

(*a*) Antè, p. 468.

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it, a new set of proprietors may be liable, and a different set of directors in office, who may disapprove of that act of their predecessors. [*Alderson*, B.—They may know that certain debts will fall due on a particular day, and find it necessary to provide for a call on that day.] Then they may resolve that a call shall be made at an indefinite period.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—Two points only remained for consideration in this case. First, whether the resolutions of the directors that calls should be made were valid, inasmuch as neither the person to whom, nor the place where payment should be made, was specified in the resolutions themselves. Secondly, whether a resolution of the directors that a call should be made *at a future day* was authorized by the statute, and binding on the proprietors. The first of these objections applied to all the four calls which are the subject of this action; the second, to one only.

We think that both these objections are unfounded, and that the plaintiffs are entitled to recover. The 115th section provides for the making of calls, and is as follows: (His Lordship read the section). There appears to us to be nothing in the 115th section, nor in any other part of the act, which requires the directors to fix the person to whom, and the place where the payment is to be made, at the same time that they resolve that a call shall be made, and as part of the same resolution. It seems to us to be open to them to fix such person, as well as the time and place of payment, at a different period and by a distinct act. A question, indeed, may arise in some cases, where there has been a change of proprietorship by transfer, what is the time of making a call (*a*), which fixes the lia-

(*a*) See *The Aylesbury Railway Co.* v. *Thompson*, and *The Same* v. *Mount*, post.

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bility of the then proprietor of a share, under the 118th section, and which prevents the free transfer of a share under the 127th section; whether it is to date from the original resolution, from the time of fixing the mode of payment, of giving notice in the newspapers, or even from the period when the calls become due. It may be that the resolution of the directors is only an inchoate act, and that the call is not complete until the mode of payment is appointed, and notice thereof given; so that no one is liable, unless he be a proprietor when the whole of these circumstances have occurred; and until all these have occurred, a proprietor is not deprived of the right of free transfer. It may be, that both the liability to pay the instalment, and the impediment to the transfer, attach from the date of the resolution itself, though the mode of payment be not fixed nor notice given till afterwards: or, lastly, it may happen that the term "call" may for one purpose date from the resolution, and for another from a different period. But it is unnecessary in this case to determine this question; for, whether the first resolution, or the time of fixing the mode of payment, or of giving the notice, (which is in this instance the same,) or even the time fixed for payment, be the call, this defendant was at each time the proprietor of the shares. All that we have to determine now is, that the directors may fix the time, place, and manner of payment, after the original resolution has been made, and by a distinct act.

It is to be observed, that there is no intermediate change of directors between the two acts. It is not proved that those who made the resolution were different directors from those who fixed the mode of payment, and we are not called upon to pronounce any opinion, whether such a circumstance would make any difference.

The second and only remaining question is, whether the resolution to make a call *prospectively* be good. This objection applies to the first call only.

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The directors, on the 13th of March, resolve that a call be made *on the 30th of March*, payable on the 1st of May. We think this mode of proceeding is valid. There is certainly nothing in the statute which expressly requires the directors to make the calls *immediately;* and we do not see any reason why they should be so restrained. They may make calls from time to time, as they think fit, when the exigencies of the Company require it, and the nature of the debts and engagements of the Company may well be such, that the amount of calls would as certainly be wanting at a *future* day, as on the very day when the resolution is made. It is probable that even the inchoate liability to *this* instalment would not attach on any proprietor until the 30th of March, the day as of which the call must, under the resolution, be considered as made, or begun to be made.

The objections, therefore, cannot prevail; and all the others having been previously disposed of, we have now to pronounce that the rule must be discharged.

Rule discharged.

said call, which said promissory notes of the plaintiff are still respectively outstanding and unpaid, and which the plaintiff still is liable to pay and discharge. Of all which said several premises in this count mentioned the defendant afterwards, and in reasonable time, in that behalf, to wit, on the 1st of December, 1839, had notice; and was, to wit then, requested to indemnify and save harmless the plaintiff from the said payments and liabilities: yet the defendant did not nor would when he was so requested, or at any other time whatsoever, indemnify or save harmless the plaintiff from the said payments or liabilities, or any of them, or any part thereof, but therein wholly failed and made default.—Account stated.

Pleas; 1st, *non assumpsit*: 2nd, (as to the first count), that there never was any such consideration for the alleged promise of the defendant in that count mentioned as therein alleged: 3rd, that the defendant did not agree to buy of or from the plaintiff, nor did the plaintiff agree to sell to him the defendant, the shares in the first count mentioned, or any or either of them, in manner and form as therein alleged: 4th, that the plaintiff hath not been, nor was ready or willing to transfer the shares, or any or either of them, to the defendant, *modo et formâ*, &c.: 5th, that the defendant had not notice of the plaintiff's readiness or willingness to transfer the shares, or any or either of them, to the defendant, *modo et formâ*, &c.: 6th, that the defendant had not notice of the alleged liabilities of the plaintiff in the first count mentioned, or any or either of them, or of any part of the same, *modo et formâ*, &c.: 7th, that the plaintiff hath been and was damnified, as in the first count mentioned, of his the plaintiff's own wrong, and by and through his the plaintiff's own means, default, and neglect: 8th, that after the making of the alleged promise in the first count mentioned, and before any breach thereof, and before the shares or any or either of them had been transferred to the defendant, to wit, on the 21st of

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for or in respect of any call or calls which should or might be thereafter made upon or in respect thereof: and although the plaintiff, to wit, on the day and year aforesaid, delivered to the defendant in performance of the said contract, the certificates of the said shares whereof he was so possessed and was such registered owner as aforesaid, and the defendant then accepted and received the same of and from the plaintiff, and, to wit then, paid him for the same according to the terms of the said sale; and although the plaintiff hath always from the time of the sale of the said shares and the making of the said promise, to wit hitherto, been ready and willing to transfer the said shares to the defendant, according to the terms of the said contract, of all which several premises the defendant, in a reasonable time in that behalf, to wit, on the day and year aforesaid and during all the time aforesaid, had notice; and although the plaintiff hath always since the said agreement well and truly performed the terms thereof, in all things on his part and behalf to be performed and fulfilled; and although subsequently to the said sale and delivery, to wit, on &c., the plaintiff, as such registered owner of the said shares as in this count before mentioned, became and was liable to divers respective calls respectively made subsequently to the said promise, sale, and delivery for and in respect of the said shares respectively, amounting altogether to a large sum of money, to wit, the sum of £2000, and by reason of the premises the plaintiff afterwards and before the commencement of this suit, to wit, on &c., was forced and obliged to pay, and did, to wit then, actually pay a large sum, to wit, the sum of £1000, for and in respect of the said calls, and was afterwards and before the commencement of this suit, to wit, on &c., forced and obliged to pay and give, and did, to wit then, pay and give divers, to wit, two promissory notes of him the plaintiff for divers large sums of money, amounting in the whole to a large sum, to wit, the sum of other £1000, for and in respect of the

said call, which said promissory notes of the plaintiff are still respectively outstanding and unpaid, and which the plaintiff still is liable to pay and discharge. Of all which said several premises in this count mentioned the defendant afterwards, and in reasonable time, in that behalf, to wit, on the 1st of December, 1839, had notice; and was, to wit then, requested to indemnify and save harmless the plaintiff from the said payments and liabilities: yet the defendant did not nor would when he was so requested, or at any other time whatsoever, indemnify or save harmless the plaintiff from the said payments or liabilities, or any of them, or any part thereof, but therein wholly failed and made default.—Account stated.

Pleas; 1st, *non assumpsit*: 2nd, (as to the first count), that there never was any such consideration for the alleged promise of the defendant in that count mentioned as therein alleged: 3rd, that the defendant did not agree to buy of or from the plaintiff, nor did the plaintiff agree to sell to him the defendant, the shares in the first count mentioned, or any or either of them, in manner and form as therein alleged: 4th, that the plaintiff hath not been, nor was ready or willing to transfer the shares, or any or either of them, to the defendant, *modo et formâ*, &c.: 5th, that the defendant had not notice of the plaintiff's readiness or willingness to transfer the shares, or any or either of them, to the defendant, *modo et formâ*, &c.: 6th, that the defendant had not notice of the alleged liabilities of the plaintiff in the first count mentioned, or any or either of them, or of any part of the same, *modo et formâ*, &c.: 7th, that the plaintiff hath been and was damnified, as in the first count mentioned, of his the plaintiff's own wrong, and by and through his the plaintiff's own means, default, and neglect: 8th, that after the making of the alleged promise in the first count mentioned, and before any breach thereof, and before the shares or any or either of them had been transferred to the defendant, to wit, on the 21st of

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February, 1838, the defendant was absolved, exonerated, and discharged by the plaintiff, from his the defendant's promise and the performance of the same.

Replication, taking issue on all these pleas.

At the trial before *Rolfe*, B., at the Liverpool Summer Assizes, 1840, it appeared, that the plaintiff, being the holder of thirty Bristol and Exeter Railway shares, employed Messrs. Richardson & Thompson as his brokers to sell them, and the defendant employed Messrs. Atkinson & Townley as his brokers to purchase them, and they made an application for that purpose. At that time £10 per share had been paid, but the shares were at a discount. It was agreed between the respective brokers that the thirty shares should be sold for 7*l.* 2*s.* 6*d.* per share, and, in pursuance of that agreement, they were sold to the defendant's brokers for him, and the usual contract notes passed between the brokers, but no time was specified for the completion of the purchase. The shares were sent by Richardson & Thompson with a blank transfer, which was then the ordinary course of business. The purchase-money was paid to them by Atkinson & Townley, who charged it to the defendant, with 2*s.* 6*d.* per share for their commission for purchasing, which made the shares stand at 7*l.* 5*s.*, which sum he allowed in his account with them. Calls were afterwards made on these shares, and they not having been registered in the books of the Company in the defendant's name, the plaintiff, as still the apparent owner of them, was obliged to pay them, and this action was brought to recover the money so paid, 957*l.* 5*s.* 2*d.* The following letters were also read in evidence:—

"Manchester, 3rd March, 1838.

"Messrs. Atkinson & Townley. Pray dispatch the thirty Bristol and Exeter Shares forthwith, I have sold at 9*l.* 17*s.* 6*d.*

"T. LANGSTON."

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"Liverpool, 3rd March, 1838.

"Mr. Thomas Langston. We herewith send you transfer of thirty Bristol and Exeter shares in blank.

"ATKINSON & TOWNLEY."

"Mr. Thomas Langston.

"Bought from Atkinson & Townley.

"20th February, 1838.

"Thirty Shares of Bristol and Exeter Railway, at 7*l.* 5*s.* - - - - -	£217	10	0
Stamp - - -	2	0	0
	£219	10	0"

On the part of the defendant it was objected, that in the absence of any express contract, there was no implied undertaking by the purchaser of the shares, to indemnify the vendor against the calls, and also that the averment that the plaintiff was ready and willing to transfer was not proved, and that therefore the plaintiff ought to be nonsuited (*a*).

The jury found a verdict for the plaintiff, with £900 damages, leave being reserved to the defendant to move to enter a nonsuit; and *R. Alexander*, in the following *Michaelmas* Term, having obtained a rule *nisi* accordingly—

(*a*) The 169th section of the Bristol and Exeter Railway Act (6 Will. 4, c. xxxvi) empowers proprietors to sell and dispose of their shares subject to certain conditions, and provides that the deed or conveyance (of which a form is given), being executed by the seller and purchaser, shall be kept by the Company, who shall enter in a book kept for the purpose a memorial of such transfer or sale, and indorse the entry of such memorial on the deed, and "until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share of the profit of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking."

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Cresswell and *Crompton* shewed cause (*a*). Two questions arise in this case. 1. Whether the averment in the declaration, of the plaintiff being ready and willing to transfer the shares, was supported by evidence; and 2. Whether there was any implied undertaking on the part of the purchaser to indemnify the vendor against subsequent calls made on him by the Company.

As to the first point, there was abundant evidence of the plaintiff's readiness and willingness; for he sent a transfer in the form used in the ordinary course of such business. In *Hebblewhite* v. *M'Morine* (*b*), (which will probably be relied upon by the other side), the party selling had no property in the shares he undertook to transfer; that case is, therefore, no authority against the plaintiff in the present.

Secondly, in all cases of this kind, there is an implied contract on the part of a purchaser to protect the seller from the consequences of his remaining the ostensible owner. By his continuing on the books of the Company, he becomes a trustee for the purchaser, who is bound to indemnify him, as the drawer of an accommodation bill is bound to indemnify the acceptor. In *Burnett* v. *Lynch* (*c*), where a lessee, by deed-poll, assigned his interest in some demised premises to A., subject to the payment of rent and the performance of the covenants contained in the lease, it was held that the lessee might maintain an action against A. for not performing the covenants during the time he continued assignee, whereby the lessee sustained damage. *Abbott*, C. J., says there: "It is true he entered into no express covenant or contract that he would pay the rent and perform the covenants. But he accepted the assignment, subject to the performance of the covenants; and we are first to consider whether any action will lie against him. If we should hold that no action will lie,

(*a*) Jan. 16, before *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

(*b*) Antè, p. 51.

(*c*) 5 B. & C. 589.

this consequence will follow; that a man, having taken an estate from another, subject to the payment of rent, and the performance of the covenants, and having thereby induced an understanding in that other that he would pay the rent, and perform the covenants, will be allowed to cast that burthen upon the other person. Reason and common sense shew that it never could be intended; and if the law of England allowed any such consequence to follow, in that case it would cease to be a rule of reason." [*Parke*, B.—That case was approved of in the judgment in *Wolveridge* v. *Steward* (*a*).] The purchaser in this case must be taken to have requested the vendor to let the shares continue in his name, from which a promise to indemnify would be implied.

R. Alexander and *Cowling*, contrà.—This case is clearly distinguishable from *Burnett* v. *Lynch* (*b*), where the defendant claimed, and, by possession of the land, obtained a benefit under the lease. Here the person remaining on the register is entitled to all the profits arising from the shares; and the plaintiff was in the legal possession of them, for the transfer, being in blank, could not confer any legal title on the defendant. *Hare* v. *Waring* (*c*) shews that certificates of shares tendered to the purchaser, not containing the names of the vendors as original proprietors, nor any indorsement of a transfer to them, were insufficient to shew a title in them to convey the shares under the act. If the plaintiff had tendered a regular deed of transfer, and the defendant had refused to execute it, he might have been liable to action. *Bligh* v. *Brent* (*d*) declares this to be personal property; and, in Com. Dig. "Covenant" (A 2), it is said, "A covenant personal is by express words, or by a covenant in law;" and (A 3), "The law does not create a covenant for a personal thing." The

(*a*) 1 C. & M. 644.
(*b*) 5 B. & C. 589.
(*c*) 3 M. & W. 362.
(*d*) 2 Y. & C. 268.

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cases suggested of an accommodation bill and of principal and surety are totally different. There the acceptor or the surety incurs liability for another person. This is a mere case of contract between vendor and purchaser.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—There were two questions in this case: first, whether, on a contract by the defendant to buy of the plaintiff some shares in the Bristol and Exeter Railway, the law implied a promise by the purchaser to indemnify the vendor against all subsequent calls, or there was any evidence in the case to go to the jury of a promise to that effect. And, secondly, whether the averment in the declaration, that the plaintiff was ready and willing to transfer, which was traversed in one plea, was proved. It appeared that the plaintiff tendered an assignment in the form required by the 169th section of the act, but with the name of the assignee in blank, which was not objected to, and no other was required.

The second objection may be easily disposed of. If it had been necessary, in order to support the allegation in the declaration, to prove the tender of a valid conveyance, this would not have been sufficient; but, it being requisite only to prove a readiness to transfer, we think there was sufficient evidence in the case of that readiness. Little reliance indeed was put upon this objection.

The other was more strongly insisted upon. We are of opinion that, under the circumstances of this case, there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. On the 20th of February, 1838, the contract was entered into, which was simply an agreement by the plaintiff to sell, and the defendant to buy, thirty shares, at the price of 7*l.* 5*s.* per share, no time being specified for

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the completion of the purchase; nor was there any such stipulation in the contract as the conveyance itself would have contained, if completed; that is, that the vendee should be subject from the date of it, or any future time, to the conditions upon which the vendor held them. If the case had rested upon this contract, the situation of the parties would have been this: the plaintiff, after shewing a good title to the defendant, would have had a right to call upon him to complete his purchase in a reasonable time by preparing a deed in the statutory form; and if the defendant had done so, the plaintiff might then have executed it, and required the defendant to do the same, and to deliver or to attend with him to deliver the deed to the Company, that a memorial might be entered into and indorsed on the deed of transfer pursuant to the 169th section. If all this had been done, the plaintiff would have been no longer liable to any call; if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he omitted to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount by way of special damage for the defendant's breach of contract. But, in this case, the plaintiff did not pursue the course which, according to law, he ought to have done. The defendant appears to have been satisfied with the title; and both the plaintiff and he to have been content, the one to deliver, and the other to accept a transfer, with the name of the vendee in blank, for the purpose, no doubt, of the defendant selling and transferring those shares to another, and filling in the name of some subsequent purchaser from himself; or, more probably, of handing over the instrument to some purchaser from himself, on receiving the price, for the shares were clearly bought on speculation.

On this occasion, when this, probably the customary course, was adopted, instead of that which the law, in the

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absence of custom, prescribes, the plaintiff might have insisted that he would not deliver such a blank conveyance as was asked, which might postpone indefinitely the actual conveyance to a vendee, unless the defendant would indemnify him against all intermediate calls; and if that had been done, the plaintiff would have been safe; but this he omitted, and there is no trace of any evidence of such a contract having been made or contemplated. The truth probably is, that the plaintiff did not think of this future liability at all; or, if he did, he thought that the shares would be sold after a new call to a purchaser, who would take the amount into consideration in fixing the price, and pay the calls to the Company in order to get the transfer completed.

We cannot, therefore, think that the plaintiff and defendant ever contemplated such an undertaking as the declaration in this case describes, and that the evidence does not warrant the jury in drawing an inference of any such engagement.

Does the law raise any such contract? We think it does not. The plaintiff, by his neglect to get the conveyance completed and the transfer entered, becomes a trustee for the defendant and his assigns, and receives the profits, and must pay the out-goings; but there is no authority for saying that the law makes any promise by a *cestui que trust* to a trustee *simply* to repay all that the trustee may pay on his own account, still less on that of the subsequent *cestui que trust*. The principle of the case of *Burnett* v. *Lynch* (*a*) does not apply. The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable in the nature of a surety, as between himself and the assignee, for the performance of the same covenants during the continuance of his interest

(*a*) 5 B. & C. 589.

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as assignee; the consequence is, that a duty is imposed on the assignee at common law to perform the covenants during that time, for which an action on the case will lie. But here the defendant contracts no liability at all with the Company, so that the plaintiff is not a surety for him; and if there were any analogy between the two cases, the defendant's implied promise would only be to indemnify against such calls as should be made whilst he should be beneficially interested, so that the promise in the declaration, which is to indemnify against *all* future calls, is too large, and no amendment could make it good, as none of the calls the subject of this action seem to have been made until after the defendant himself had parted with the shares.

We are of opinion, therefore, that this action will not lie, and the rule must be absolute to enter a nonsuit.

Rule absolute.

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COURT OF COMMON PLEAS.

In Easter Term, 1841.

April 26th.

THE LONDON AND BRIGHTON RAILWAY COMPANY v. FAIRCLOUGH.

The London and Brighton Railway Act (1 Vict. c. cxix, s. 140) enacts, that the Company shall enter the names and additions of the shareholders in a book, and cause the common seal to be affixed thereto; and, section 142, that they shall enter in a book the names and places of abode of persons who from time to time shall be entitled to any share in the undertaking; and section 148 provides, that in an action for calls it shall only be necessary to prove that the defendant was a proprietor of the shares, and that notice was given of the calls; and that the production of the *books* above-mentioned shall be *primâ facie* evidence that the defendant is a proprietor.

DEBT for two calls of £3 each per share on forty-five shares, with interest from the time the calls became payable. Pleas, 1st, *Nunquàm indebitatus*. 2nd, That the defendant was never proprietor of the shares, or any of them. The cause was tried at Guildhall, before *Tindal*, C. J., at the sittings after Hilary Term, 1840. It appeared, by the evidence, that, on the 12th of February, 1830, a Mr. Flood, an original registered proprietor of shares under the act (1 Vict. c. cxix.) executed a transfer of thirty-five shares to the defendant; and, on the 27th, a Mr. Buckingham, also an original registered proprietor, a similar transfer of twenty-five shares. These transfers were, on the 9th and 12th of March following,

Held, that the production of the book required by the 140th section, containing the defendant's name, as proprietor of the shares, was alone not sufficient *primâ facie* evidence of his being a proprietor.

Section 155 gives a form of transfer of shares, and provides that on every sale the deed of conveyance (being executed by the seller and purchaser) shall be kept by the Company, who shall enter in a book a memorial of such transfer, and indorse the entry thereof on the said deed, and, until such memorial shall have been made and entered, the seller shall remain liable for calls.

Held, that a deed of transfer of shares to the defendant, which had been first executed by the vendor to J. H. as purchaser, and upon which the purchase-money was paid, which was afterwards altered by having the name of J. H. struck through, and the defendant's inserted, and then re-executed by the vendor without being re-stamped, was void.

Held, also, that the resolution for making calls need not specify a time or place of payment.

And that proof of the entry of the memorial of a transfer-deed, under section 155, is not necessary to enable the Company to recover, the provisions of that section being intended only for the security of the Company.

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left at the office of the Company to be memorialized, as provided by section 155.

It appeared, on cross-examination, that the transfer from Flood had been originally executed by him to a Mr. Howell, and handed to Howell's broker, by whom the consideration was paid; that, shortly afterwards, the transfer was taken back to Flood's broker to be re-executed, on the ground that Howell's name had been inserted in it by mistake, instead of the defendant's; that Howell's name having been struck through with a pen, and the defendant's name inserted instead, the transfer was re-executed by Flood, and a memorandum was made in the margin of the transfer to the effect that the alteration in the names was made before it was executed; and that, in that state, without being re-stamped, the transfer was left at the Company's office. There was also an indorsement on it, by the secretary of the Company, that a memorial of the transfer had been entered in a book, kept by the Company for that purpose, entitled, "A memorial of registers of transfers," March 12th, 1838. In the deed of transfer executed by Buckingham there were no alterations.

On the 3rd of May, 1838, the directors passed a resolution, "that a call of £3 per share be made, and notice thereof given, according to the act, after the lapse of a week from the date of insertion of the contracts now read;" which was accordingly done by advertisement in the newspapers; and on the 16th of May, a notice was inserted in the London and Brighton newspapers that the directors had made such call, and directing the same to be paid, on or before the 5th of June, to certain bankers therein mentioned; a notice was also sent to each proprietor, (including the defendant,) informing him of the call, and of the amount due on his shares. The defendant's name was not entered in any sealed register of the Company until the 7th of May, 1838, when the half-yearly general meeting

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took place. It appeared that various blanks were left in the columns of the register book, and that a new register was made up just before, and sealed at each successive half-yearly general meeting of the Company. On the 23rd of August, 1838, a second call of £8 per share was resolved upon, and notice given as before for a call payable on the 17th of October next. The defendant had parted with five of the sixty shares before the calls were made, and paid the calls on ten others; so the action was brought for calls on the remaining forty-five.

To prove the defendant a proprietor of the shares, the sealed register was produced by Mr. Ottley, the chief clerk to the Company, and also the assignment of the shares to the defendant, but the book containing the entry of the memorials was not produced; and for the purpose of proving the making of the calls, the minute-book of the Company was produced, containing the entries of the resolutions, signed by the chairman of the directors, not at the meeting at which they were passed, but the subsequent one. The first specified no time or place for payment, and the second no place. The requisite notices of the calls were proved to have been given, which did specify the time and places of payment (*a*).

(*a*) The following are the sections of the act material to the case:—Section 140 requires the Company "at their first or some subsequent general meeting, and afterwards from time to time, to cause the names of the several corporations, and the names and additions of the several persons who shall now be or shall from time to time hereafter become entitled to shares in the said undertaking, with the number of shares to which they are respectively entitled, and the amount of the subscriptions paid thereon, and also the proper number by which every such share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made to cause the common seal to be affixed thereto," &c. (A form of a certificate is given, which is to be delivered by the Company to every proprietor on demand).

Section 142 requires the Company, "in some proper book to be provided by them for that purpose, to enter and keep a true account of the names and places of abode of the several persons who from time

A verdict was taken for the plaintiff by consent for 290*l.* 11*s.* 7*d.*, the amount of the calls and interest, leave being given to the defendant to move to set aside the verdict and enter a nonsuit, or to reduce the da-

to time shall be entitled to any share in the said undertaking," &c.

Section 146 empowers the directors "from time to time to make such calls of money from the subscribers to and proprietors of shares in the said undertaking, to defray the expenses of carrying on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or principal money paid for or in respect of any such shares, shall not amount to more than the sum of £50 on any share of that amount; and so that no such call exceed the sum of £10 upon each such share, which any person or corporation shall be possessed of in the said undertaking, and that the total amount of such calls in any one year shall not exceed £25 upon each such share, and in proportion for all shares of less amount; and so that an interval of three calendar months at the least shall always elapse between the day appointed for payment of one call and the day appointed for the next succeeding call, and twenty-one days' notice shall be given of every such call by advertisement inserted in one or more London newspaper or newspapers; and all monies so called for shall be paid to such persons and in such manner as in the notice shall be appointed, and the respective owners of shares in the said undertaking shall pay their rateable proportion of the monies, to be called for as aforesaid, to such persons and at such times and places as shall be appointed as aforesaid." (Provision, in case of non-payment, for the Company to recover the same with £5 per cent. interest, or for the directors to declare the shares forfeited, &c.)

Section 148, (after giving a form of declaration in any action for calls), provides "that on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of such share or shares as such action is brought in respect of, or some one such share; and that such notice was given, as directed by the act, of such call or calls having been made, without proving the appointment of the directors who made such call, or any other matter whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid. And in order to prove that the defendant was a proprietor of such share or shares in the said undertaking as alleged, the production of *the books*, in which the said Company is by this act directed to enter and keep respectively the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and

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mages; and *Bompas*, Serjt., in the Easter Term following obtained a rule *nisi* accordingly, on the following objections:—

1. That the minute-book, containing the resolutions of the meetings for making the calls, was not admissible in evidence, the signature of the chairman not having been affixed at the meetings.

2. That one of the resolutions did not specify the time or place for payment of the calls.

3. That the register-book was not kept in conformity

places of abode of the several persons who shall from time to time be entitled to shares in the said undertaking, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Section 155 enacts, "that it shall be lawful for the several proprietors of the shares of the said undertaking, and their respective executors, administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned; and the form of conveyance of shares shall be by writing duly stamped, and may be in the following words. (The section then gives a form.) And in every such sale the deed of conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or secretary or clerk of the said Company, who shall enter in some book to be kept for that purpose a memorial of such transfer or sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which entry and indorsement the sum of *2s. 6d.* and no more shall be paid to the said Company; and the said Company or the secretary or clerk is hereby required to make such entry or memorial accordingly, and on demand to make an indorsement of such transfer on the certificate of each share so sold, and deliver the same to the purchaser for his security, for which indorsement no more than *2s. 6d.* shall be paid; and such indorsement being signed by the said secretary or clerk shall be considered in every respect the same as a new certificate; and until such memorial shall have been made and entered as before directed, the seller of such share shall remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking."

And section 187 enacts, "that the orders and proceedings of all meetings of the said Company, directors and committees, shall be entered in a book, and shall be signed by the chairman *of* such respective meetings," &c.

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with the act, having been made up after the first call was made.

4. That two books (the one required by sect. 142 as well as that by sect. 140) should have been produced to prove the defendant a proprietor, according to sect. 148.

5. That the transfer of the shares was not proved to have been memorialized, as required by sect. 155.

6. That one of the transfers was inadmissible, having been re-executed without being re-stamped.

Kelly and *Bramwell* shewed cause (*a*).—The first objection, that the book was not signed *at* the meeting, has been disposed of by the case of *The Southampton Dock Company* v. *Richards* (*b*), which also decides the third objection as to the making-up of the register-book. The second, that no time or place is specified in the resolution for the call, is overruled by *The Great North of England Railway Company* v. *Biddulph* (*c*). It is sufficient if they be stated in the notice.

As to the fourth, the plaintiffs contend, that both the books required by the statute were in fact produced at the trial (*d*), but if it were not so, the deficiency was supplied by other evidence, that is, by the production and proof of transfers of the shares to the defendant, bearing date prior to the first call. Upon these transfers the fifth objection arises, that they were not proved to have been memorialized under the act, and that not only they are no transfers until memorialized, but that the burthen of proof lies upon the plaintiffs to shew that they were so. But that

(*a*) April 20th, before *Tindal*, C. J., *Bosanquet*, *Coltman*, and *Erskine*, Js.

(*b*) Antè, p. 215. The words in that statute were "*at* the meeting."

(*c*) Antè, p. 401.

(*d*) There being considerable doubt upon this point, affidavits were read on both sides; upon which the Court held, that the book required by section 148 had not been produced.

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is not so: they prove a transfer according to the statute, which vests the property in the defendant, and it is for him to shew it was not memorialized; for the transferee is not entitled to vote until he produces it memorialized and receives a certificate. But upon these transfers there appears the certificate of memorial made by the secretary; and that being an act done by the Company removes the objection, and makes it unnecessary to produce the memorial itself. In *Doe* d. *Lewis* v. *Bingham* (*a*), where an objection was taken to a mortgage deed not having been duly enrolled, *Holroyd*, J., says, "I am of opinion that the *onus probandi* lies upon the party seeking to avoid the deed by want of enrolment; and *Doe* v. *Mason*, 3 Camp. 7, is an authority in point." See also *Doe* d. *Williams* v. *Lloyd* (*b*), and *Kinnersley* v. *Orpe* (*c*). Therefore, if the plaintiffs are right in the fact of both books having been produced, they are entitled to recover the first call; and if the transfers are proved satisfactorily, all objections are disposed of by proving the defendant *aliundè* a proprietor.

But sixthly, it is objected that one of those transfers is not admissible without a second stamp, as having been twice executed. It appears by the form of the instrument that it is of no avail as a contract or conveyance till both parties execute. It is no instrument at common law, but created by statute in a particular form. To require a second stamp, it must be said the first deed was complete. [*Tindal*, C. J.—The question is, whether the estate is not out of the vendor by his executing.] The test is, whether any thing was finally done, so as to divest any right from one person and invest another with it. If nothing more had taken place than the execution by the original proprietor, he would not have passed any estate or interest

(*a*) 4 B. & A. 672.
(*b*) 1 Scott, N. R. 505.
(*c*) 1 Dougl. 56; and see *The Aylesbury Railway Company* v. *Thompson*, post.

out of him, and would have been still liable. As long as a matter is *in fieri*, it is competent to make any alteration whatever, and this is merely an alteration. See *Jones* v. *Jones* (*a*), where an alteration was made in a marriage settlement, after execution by the conveying party, by striking out one of the clauses, after which it was re-executed, and was held not to require a new stamp. The only difference between that case and this is, that there all the parties were present, but the execution might have been at their several residences, and yet would have been perfect. So, in *Spicer* v. *Burgess* (*b*), a release having been executed to one witness, and it appearing that another must also be released, his name was inserted in the release, and the defendant re-executed it; Lord *Lyndhurst*, C. B., said, "So long as the deed remained *in fieri*, it is not completely executed, and the stamp was not occupied." See also *Matson* v. *Booth* (*c*), *Murray* v. *The Earl of Stair* (*d*), and Sheppard's Touchstone, p. 285, where it is said that, "feoffments, gifts, grants, and leases, may be avoided by the disagreement of the party to whom they are made, and if it be a lease for years that is made, he may waive and avoid that by word of mouth in the country, as well as a gift of goods, or an obligation delivered to his use; but if it be an estate of freehold that is made by feoffment, &c., it seems he cannot waive and avoid that but in a Court of record." And see the authorities collected in *Small* v. *Marwood* (*e*). The interest, therefore, in this case, was not such as to require a deed to renounce it; but in order to vest it in Howell, some act by him should be shewn from which his assent might be implied. Flood had passed it away for a consideration: it was therefore suspended until the defendant completed the transaction by executing the transfer. At all events,

(*a*) 1 C. & M. 721.
(*b*) 1 C. M. & R. 129.
(*c*) 5 M. & S. 223.
(*d*) 2 B. & C. 88.
(*e*) 9 B. & C. 300; S. C. 4 M. & Ryl. 181; and p. 189, n.

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whether the deed be valid or not, the memorial indorsed on it by the secretary is conclusive proof of the ownership of the defendant.

Bompas, Serjt., and *Cowling*, contrà.—There are now two material questions: 1. Whether the defendant was proprietor of the shares when the calls were made; and, 2. Whether the plaintiffs have legally made calls, so as to entitle them to claim from the defendant?

I. The first objection may extend to all or part of the shares. Two objections arise on the instruments put in: 1st, Was the first deed a good deed? It was made out and delivered to Howell's brokers, who paid the purchase-money for Howell; therefore he accepted the shares. That deed, then, perfectly passed the shares between those parties, even without Howell's signature; for it is not necessary that the person who receives property should execute the deed, if he accepts it. But now it cannot be supported, for the insertion and alteration of a transferee's name would make it void: *Hill* v. *Patten* (*a*), *French* v. *Patten* (*b*); and see *Hebblewhite* v. *M'Morine* (*c*), where the transfer deed having been delivered in blank, the Court held that the transferee's name could not be inserted but by power of attorney. The cases referred to by the other side are distinguishable. In *Jones* v. *Jones* (*d*), the deed was only an escrow till out of the possession of the deliverer. *Spicer* v. *Burgess* (*e*) was a case of a deed poll of which the witness never knew. As to the case in Sheppard's Touchstone, *Begbie* v. *Crook* (*f*) overrules it, on the authority of *Townson* v. *Tickell* (*g*). The deed is complete as soon as the vendor has executed it: as far as he is concerned he has passed the title, and could not bring trover; otherwise

(*a*) 8 East, 373.
(*b*) 1 Campb. 72.
(*c*) Antè, p. 51.
(*d*) 1 C. & M. 723.
(*e*) 1 C. M. & R. 129.
(*f*) 2 B. N. C. 70.
(*g*) 3 B. & A. 31.

there would be great fraud on the revenue. It might as well be said a deed is *in fieri* till it is enrolled. 2nd. Then, however the conveyance may operate between parties, there can be no effectual transfer, as between the Company and a party, unless it be memorialized under section 155. Until then the seller is liable to calls, and has a right to profits, and the purchaser has no interest. The plaintiffs say they have done so, because there is a memorandum of it on the face of the transfer deed; but that was not shewn at the trial, nor, assuming that, is it any evidence of a memorial. This is not like the case of a chirographer or other public officer, whose indorsement, according to *Kinnersley* v. *Orpe* (*a*), is receivable; because, by section 155, these deeds are not to be given back to the party, but kept by the officer; therefore it is a mere private memorandum for the security of the Company; the distinction drawn in *Appleton* v. *Lord Braybrooke* (*b*), by *Abbott*, C. J., who said he thought that such analogy did not hold; because in the case of a fine, the chirograph is delivered out as part of the title of the person applying, by an officer specially intrusted for that purpose. So in *Doe* d. *Williams* v. *Lloyd* (*c*), the Court held a memorandum of inrolment of a deed (under 9 Geo. 2, c. 36) sufficient evidence, it having been made by the proper officer in the execution of his duty; but it seems that the indorsement of an officer, or one who purports to be so, is only evidence where it is given back to the party, which is not the case here. The proof lies entirely in their own knowledge, and they have failed in proving the transfers made in such a manner as to entitle them to recover. They were, therefore, bound to produce the transfer-book.

II. Then were the calls properly made? By the 146th section, three months must elapse between the calls, and there must be twenty-one days' notice of one; therefore

(*a*) Dougl. 56. (*b*) 6 M. & S. 34. (*c*) 1 Scott, N. R. 505.

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there ought to be a day fixed for payment in the original calls, to enable persons to ascertain that these two points have been observed. They answer that by saying, there is a notice by the secretary, and cite *The Great North of England Railway Company* v. *Biddulph* (*a*), to shew that his authority is presumed. But there is a marked distinction between the two cases; there the objection was not taken at the trial. The directors only have the power to make calls, and this notice does not purport to be by them. [*Bosanquet*, J.—Is not the day to be appointed in the notice?] The day is mentioned in the act before the notice, and must be by the authority of the directors, even if in the notice. [*Coltman*, J.—Suppose they had two meetings, one for making the call, and the other for fixing the day.] Then the last would be the call, and the directors must shew the authority for the day. The secretary is a mere ministerial officer, and might as well be allowed to fix the amount of the call. The same objection applies as to the place of payment. Section 173 relates to other matters, only giving a shorter mode of serving a notice in lieu of personal notice. But section 146 does not require personal notice. Suppose a fraudulent notice had been put in by the secretary, that calls were to be paid at a certain time and place; that would not bind the directors. There is no proof here that the notice was signed by the chairman or deputy chairman, to give authority in advertising, and these calls, therefore, were irregularly made.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court. —This was an action brought to recover the amount of two calls of £3 each upon forty-five shares in the London and Brighton Railway Company, amounting to the sum of £270, for which sum, and interest thereon, amounting together to the sum of 290*l.* 15*s.* 7*d.*, the jury found a ver-

(*a*) Antè, p. 401.

dict for the plaintiffs. The defendant obtained a rule to shew cause why either a nonsuit should not be entered, or the damages be reduced, on the ground of various objections taken at the trial to the plaintiff's right to recover. During the course of the argument upon shewing cause against the rule, some of the objections were abandoned, and others disposed of, so that ultimately there remained but two objections for consideration; namely, one, whether the calls for which the action was brought had been duly and properly made; and the other, whether sufficient evidence had been given that the defendant was the proprietor of the shares in respect of which he was sued.

The first objection, if maintainable, goes to the whole of the action; for if neither of the calls was made in due observance of the requisites prescribed by the statute, it is obvious that the plaintiffs can have no right to recover. Now, the objection to the calls, upon which the argument ultimately proceeded, was this: that the resolution of the directors of the 3rd of May neither specified the time of payment nor the place at which such payment should be made; and that the resolution of the 2nd of August for the second call, though it specified the time of payment, was deficient in not specifying any place. The question, therefore, is, whether it is made necessary in any clause of the act that the resolution of the directors should embrace in it the time and place of payment, or whether it is sufficient that these particulars should be notified to the shareholders in the advertisement published according to the directions of the act. The power of making calls is given to the directors by the 146th section; but, upon the examination of that section, it will not be found that the insertion of the time and place of payment is essential to the validity of the original order; all that is laid down in that clause, as conditional to the legality of any call, being the amount of each several call, and the aggregate

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amount of such calls in any one year, and the interval that must elapse between each of the successive calls. On the contrary, the 146th section expressly directs that a certain notice shall be given by advertisement, and "that all monies so called for shall be paid to such persons and in such manner as in such notice shall be appointed, and the respective owners of shares in the said undertaking shall pay their rateable proportion of the monies to be called for as aforesaid, to such persons and at such times and places as shall be appointed as aforesaid;" thereby making the appointment of the time and place a matter which must appear in the advertisement, which is seen by all the shareholders; and not in the resolution, which will probably be seen by few or none of them; and when it is considered that the 148th section provides, that, on the trial of the action, it shall only be necessary to prove the defendant was the proprietor of the shares, and that "such notice was given as is directed by the act, of such call having been made, without proving the appointment of the directors, or any other matter whatever," we think it must be wholly unnecessary to shew that the original resolution contained either the place or time of payment. As to the argument, that the secretary is not shewn to have authority to make the publication, we think that such an authority by the directors must be presumed as an act obviously within the scope of their duty, or that, at all events, they adopted the act, unless the contrary is shewn.

With respect to the second objection, the want of proof that the defendant was the holder of forty-five shares, the first ground is, that the evidence required by the 148th section was not brought forward at the trial. By that section, the plaintiffs are required to make out a *primâ facie* case of ownership against the defendant, by the production at the trial of the "books" in which the Company are directed to "enter and keep respectively the names and

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additions of the several proprietors of shares in the said undertaking, with the number of shares they are respectively entitled to, and an account of the names of the several corporations, and of the names and places of abode of the several persons who shall from time to time be entitled to shares in the said undertaking," the former of which books is directed to be kept by the 140th section, and the latter by the 142nd. The first question, therefore, is, whether, in point of fact, both those books were produced and brought forward to the notice of the Judge and the jury at the trial of the cause. The plaintiffs contend that they were, and the defendant denies the fact; and we have come to the conclusion upon this point, upon reference to the notes of the trial, and the affidavits which have been furnished on both sides, that the book directed to be kept by the 142nd section was not in evidence at the trial.

In order, therefore, to prove the proprietorship of the shares, it becomes necessary for the plaintiffs to stand upon the direct evidence which they offered at the trial of the transfer of the shares to the defendant, as to which point there is a distinction taken by the defendant between the thirty shares transferred to him by Flood, under the deed of transfer of the 12th of February, 1838, and the fifteen shares transferred to him by Buckingham under the deed of transfer of the 27th of the same month. With respect to the first transfer, it is contended, on the part of the defendant, that the deed, upon the face of it, has been altered, by substituting the name of the defendant, in the place of the name of the original transferee, and that it is, therefore, void for the want of a new stamp. The answer attempted to be given to this objection is, that the insertion of the original name was made by mistake, and that, whilst the matter was still *in fieri*, the seller had a right to correct such mistake, by inserting the name of

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the real purchaser. But we are of opinion that, admitting such alteration might have been made without destroying the validity of the instrument, under such an assumed state of facts, yet that it was incumbent upon the plaintiffs, who produced and relied upon the deed in its altered shape, to shew the circumstances under which the alteration was made, and that such a state of facts had really existed; for we think that deed would have an operation at common law, independently of any effect to be given to it by the execution by the purchaser, under the 155th section, and that the power of the stamp would be exhausted by such operation of the deed at common law; and as to the argument that the memorial, indorsed on a transfer, proves conclusively the ownership, we think, if it appears to be an unstamped deed on its production, any further matter therein stated by the secretary cannot give validity or efficacy to the transfer. We, therefore, think that the plaintiff has failed in proving that the defendant was the proprietor of the thirty shares at the time the calls were made.

But with respect to the transfer of the fifteen shares made on the 27th of February, such transfer appears to be free from any objection; for as to the argument that, under the 155th section no such deed of transfer can convey any interest to the purchaser, until after the memorial thereof has been entered in a book to be kept for that purpose by the Company, or the secretary, or clerk, we consider the provisions of that section to be intended only for the security of the Company, and not as effecting any alteration in the common law operation of the deed, namely, that until a memorial of a deed is entered, the Company may compel the seller to pay all the future calls, and that the Company may be safe in paying any profits to the seller; but if the Company have possession of the deed of transfer, as they had in the present

case, there is nothing to prevent them treating the defendant as the proprietor of the shares under the legal effect of the deed.

Upon the whole, we think the plaintiffs are entitled to recover the amount of the two calls on the fifteen shares, and the interest thereon, and to that amount only, and that the rule for reducing the verdict to that sum, should be made absolute.

Rule accordingly.

COURT OF EXCHEQUER.

In Easter Term, 1841.

THE GRAND JUNCTION RAILWAY COMPANY *v.* WHITE. *April 28th.*

TRESPASS for breaking and entering a close of the plaintiff, situate in the parish of Eccleshall in the county of Stafford, that is to say, a certain close called the Grand Junction Railway, and breaking down gates, hedges, and fences &c. in the said close. Plea, that the said close and

By a Railway act (3 Will. 4, c. xxxiv. s. 183), it is enacted that it shall be lawful for the owners and occupiers of lands through which the railway shall be made (except in cases in which the Company shall, at their own expense, have made communications from the land on one side of the railway to the land on the other, according to an agreement with the owner &c., or according to the provisions of this act), at all times, for the purpose of occupying the same lands, to pass and repass, and to lead horses, cattle, &c. directly over and across such parts of the railway as shall be made in or upon their lands. The 180th section had provided, that the Company shall at their own expense, so soon as the railway shall be laid out and formed, make such communications as two or more justices of the peace shall upon the application of the owner &c. (in case of any dispute) judge necessary and appoint. Section 186 prohibits any person from riding, leading, or driving any horse &c. upon the railway "except only in directly crossing the same as aforesaid, at places *to be appointed* for that purpose, for the necessary occupation of the respective lands through which the railway shall pass."

Held, that until the Company have made a communication, a party whose land has been severed by the railway, has a right to pass from his property on one side of the railway to the other, at any point, and that the words "to be appointed" in section 86 must be read with the addition of "when such places shall have been appointed."

Where a clause in an act of Parliament furnishing a defence to an action of trespass contains a proviso or exception, the defendant should negative it in his plea; but where the proviso or exception is in another clause, in order to shew the case to be within it, or the former clause not applicable, such matters should be replied.

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railway, in which &c. in the declaration mentioned is part of a certain railway called The Grand Junction Railway, which said railway was made and formed under and by the authority and subject to the provisions of a certain act of Parliament, to wit, an act (3 Will. 4, c. xxxiv) intituled &c.; and that before and at the several times when &c. in the said declaration mentioned, he the defendant was the occupier of a certain close or land through and over which the said railway was made and passed, and which said close or land had been and was by the said railway severed and divided into two parts, one part thereof being on the west side of the said railway, and the other part on the east side thereof; and the defendant says that the plaintiffs (The Grand Junction Railway Company), not having after the said severance and division of the said close or land at their own expense made a communication from the said part of the said close or land lying on the west side of the said railway to the said part of the said close or land lying on the east side thereof, according to any agreement with any owner or occupier of the said close or land, or according to the provisions of the said act in this plea above mentioned, he the defendant, as such occupier of the said close or land at the said several times when &c., for the purpose of occupying the said close or land did pass from the said part of the said close or land of the defendant lying on the west side of the said railway directly and not otherwise, over and across the said close and railway, in which &c., in such part thereof and in such part only as had been made in and upon and then ran through the said close or land of the defendant, unto and into the said part of the said close or land of the defendant lying on the east side of the said railway, the passage upon or along the said railway not being thereby, or by consequence thereof, in any way hindered or obstructed, nor the same, nor the works connected therewith, in any way damaged, as he the defendant lawfully might; and in so doing the defendant

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with his feet in walking unavoidably a little trod down, trampled upon, consumed, and spoiled the said grass of the plaintiffs then growing and being in the said close and railway in which &c., in such part thereof as had been made in and upon the said close or land of the defendant as aforesaid; and because the said gates, and the said hedges and fences had been wrongfully set up and erected, and were then erected, standing, and being in and across the said part of the said close and railway, in which &c., and which had been made in and upon the said close or land of the defendant, so that without forcing and breaking open the said gates, and breaking down, prostrating, and destroying the said hedges and fences respectively, the defendant could not then go, pass and repass in the said part of the said railway and close in which &c., as he of right ought to have done on the occasions aforesaid, he the defendant at the said several times when &c., in the declaration mentioned, in order to remove the said obstruction, did break and force open the said gates, and thereby did unavoidably a little damage and spoil the same, and did break down and prostrate and destroy the said hedges and fences respectively in the declaration mentioned, and removed the said gates and the materials of the said hedges and fences to a proper and convenient distance, and there left the same for the use of the plaintiffs, doing no unnecessary damage to the plaintiffs on those occasions, which are the same alleged trespasses in the declaration mentioned.

Special demurrer, assigning for causes, that it is not alleged, and does not appear in the said plea with sufficient or any certainty, that any application, request, or notice was made or given by or on behalf of the defendant or any other person, to, or to any one on behalf, or the account of the plaintiffs, or to any justices of the peace, that any such communication as in the said plea alleged was desired, or was necessary or convenient to the defendant as such occu-

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pier as therein mentioned, or to the occupier or owner of any estate or interest in the said lands therein mentioned, or any part thereof; nor is it alleged, nor does it appear thereby with such certainty as aforesaid, that any such communication as therein alleged was desired, or was necessary or convenient as aforesaid at any or what time, or that the plaintiffs, or any one on their behalf, had any notice thereof, or reason to believe the same; nor is it alleged, nor does it appear thereby with such certainty as aforesaid, what are the said provisions of the said act in the said plea mentioned, or how the plaintiffs have not complied with such provisions; or whether the defendant has so complied, or in what manner or respect. Joinder in demurrer.

The points marked for the plaintiffs were:—that the plea is not warranted by the 183rd section of the Grand Junction Railway Act (3 Will. 4, c. xxxiv), or any other clause thereof(*a*); and also that it is bad for the objections specially assigned as causes of demurrer.

(*a*) By the 3 Will. 4, c. xxxiv, s. 63, it is enacted, "that after any lands, tenements, or hereditaments intended to be taken or used for the purposes of this act, shall have been set out and ascertained, it shall be lawful for all persons whatsoever, not only for and on behalf of themselves, &c. but also for all persons entitled in reversion, &c. or interested in any such lands, &c. to contract for, sell, and convey the same, or any part thereof unto the said Company." (The section then gives the form of conveyance, containing, *inter alia*, the following words):—"I &c., in consideration &c., do hereby grant and alien to the said Company, their successors, and assigns, (describing the premises to be conveyed), together with all ways, rights, and appurtenances thereunto belonging, and all such estate, right, title, and interest in and to the same and every part thereof, as I am or shall become seised or possessed of," &c.; "and all such conveyances and assurances, as aforesaid, shall be valid and effectual in the law to all intents and purposes," &c.

Section 78 enacts, "that in ascertaining the sum or sums of money to be paid for the purchase of any lands, &c., the jury shall also ascertain and assess the compensation and satisfaction to be made by the said Company for any damages which shall or may be sustained by reason of severance, and other the powers of the act."

Section 180 enacts, "that the said Company shall, at their own expense, so soon as the said rail-

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The defendant's points were:—that it is quite immaterial whether any such request or notice, as stated in the grounds of demurrer, was made or given either to the

way shall have been laid out and formed, forthwith make and erect, and from time to time maintain, such and so many convenient gates, in, upon, or adjoining the said railway, and such and so many bridges, arches, hollows, culverts, fences, ditches, drains, and passages over, under, or by the side of, or leading to or from the said railway, of such dimensions and in such manner as two or more justices of the peace for the counties of Lancaster, Chester, Stafford, or Warwick, within their respective jurisdictions, shall, *upon the application of the owner*, lessee, or tenant of any lands, mines, or minerals, judge necessary and appoint, (*in case there shall be any dispute about the same*), for the use of the owners and occupiers of the respective lands, mines, and minerals on either side of the said railway, or for protecting the said lands, mines, and minerals from trespass, or the cattle or other property of the owners or occupiers thereof from straying or escaping thereout by reason of such railway or any other matter or thing to be done in pursuance of this act; and all such gates, &c., so to be made as aforesaid, shall from time to time and at all times thereafter be maintained in sufficient repair and condition by the said Company, (who for this purpose may enter lands &c.) And in case the said Company shall refuse or neglect to make or erect or maintain such gates, &c., as hereinbefore directed, or any of them, for the space of ten days next after the time to be appointed for those purposes respectively by such justices, it shall be lawful for the respective owners or occupiers of the said lands, mines, or minerals, who shall find themselves aggrieved by such neglect or refusal, to make and erect, or (as the case may require) to maintain and repair such bridges, &c., as the said justices shall have directed or appointed to be made and erected as aforesaid, (so that in making, erecting, repairing, or maintaining such gates, &c., as aforesaid, the said railway, or any of the works by this act authorized to be made or constructed by the said Company, shall not be obstructed or damaged), and all the reasonable costs and charges thereof, (to be settled and allowed by the said justices), shall be repaid by the said Company to the respective owners, &c., who shall have so made, erected, repaired and maintained such gates, &c., as aforesaid," &c.

Section 181 enacts, "that if any of the owners or occupiers of any lands, through which the said railway shall be made, shall at any time apprehend that any of the gates, &c., which the said justices shall have so directed or appointed to be made or erected by the sai Company, are insufficient (either in number or situation) for the commodious use or occupation of the respective lands, &c., through or over which the said railway shall pass, it shall be lawful for any such owner or occupier, (with the

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plaintiffs or to two justices; and that the 183rd section of the Railway Act applies, whenever, in fact, no road or communication has been made, either by agreement or upon

consent of the said Company, upon request in writing made to them, or in case of their refusal for the space of ten days next after such request, then, with consent of the said justices, given after summons to the said Company, and due hearing of their objections), to make and erect, at the costs and charges of such owners or occupiers, any other gates, &c., of the same or like construction or form with those made and erected by the said Company, over, under, or by the side of, or leading to or from the said railway, in such place or places as such justices shall find and adjudge to be necessary and most convenient for the better use, cultivation, improvement, or occupation of such lands, &c.; and such gates, &c., shall thenceforth be repaired by and at the expense of the respective owners or occupiers for the time being of the respective lands, &c., the respective owners or occupiers of which shall have made or erected the same: provided, however, that as to the making, erection, maintaining, or repairing of such gates, &c., the free passage along or upon the said railway be not prevented or obstructed thereby or by reason thereof."

Section 182 enacts, "that the said Company shall, and they are hereby required, at their own expense, after any land shall have been taken for the use of the said railway or other works, to separate the same and to keep the same constantly separated from the lands adjoining to such railway and other works, with good and sufficient posts, rails, hedges, ditches, mounds, or other fences, in case the owners of such lands adjoining to such railway and other works, or any of them respectively, shall at any time desire the same to be so fenced off, or in case the said Company shall think proper so to fence off the same, (instead of erecting gates across the same), and shall make and maintain all necessary gates and stiles, in all such fences to be made as aforesaid (all such gates being made to open towards such lands, and not towards the said railway); and in every such case the powers, provisions, directions, and regulations hereinbefore contained with respect to the gates and other works aforesaid, shall extend and apply to the making and maintaining of such fences, and the gates and stiles in such fences, as fully and effectually to all intents and purposes as if such powers, provisions, directions, and regulations were here repeated and enacted with respect to such fences, gates, and stiles."

Section 183 provides, "that it shall be lawful for the respective owners and occupiers of lands through which the said railway shall be made, and their respective servants and workmen, (except in cases in which the said Company shall at their own expense have made communications from the land on the one side of the railway to the land on the other side thereof,

the award of the two justices; and also, that the act referred to being a public act, it was unnecessary to set out the provisions of it with more particularity than has been used in fact.

Cowling for the demurrer (*a*).—The question is, whether the defendant is authorized by the statute to break down the fences under the circumstances stated in the plea. It is not alleged that he had any interest when the railway was made, or that there has been ever any necessity for the way, or any request to have a communication made. For aught that appears, the Company may have abstained, at

according to an agreement with any owner or occupier thereof, or according to the provisions of this act), at all times, for the purpose of occupying the same lands, and without payment of any toll, to pass and repass, and to lead and conduct any horse, mule, or ass, cow, or other cattle, sheep, swine, or other beast, directly (but not otherwise), over and across such part (and such part only) of the said railway as shall be made in or upon their respective lands; provided that by so doing or by consequence thereof the passage upon or along the said railway be not in any way hindered or obstructed, or the same or the works connected therewith be not in any way damaged."

Section 186 provides, "that if any person (save and except the said Company and their deputies, contractors, agents, servants, and other persons authorized by them), shall ride, lead, or drive, or cause or assist &c., upon such railway or any part thereof, any horse, &c., or any other beast or animal, (except only in directly crossing the same as aforesaid, at places to be appointed for that purpose for the necessary occupation as aforesaid of the respective lands through which the said railway shall pass), every person so offending shall forfeit and pay any sum not exceeding £10 for every such offence."

Section 187, "And whereas it may be attended with very great danger to the public, if the said railway should be used by persons on foot: be it therefore enacted, that, if any person shall travel or pass on foot upon the said railway or any part thereof, without the license and consent of the said Company, (except the respective owners or occupiers of lands through which the said railway shall pass, and their respective servants in passing, as aforesaid, directly across the same as hereinbefore authorized), every person so offending shall forfeit and pay to the said Company any sum not exceeding 40*s.* for every such offence."

(*a*) Before Lord *Abinger*, C. B., *Parke*, *Alderson*, and *Rolfe*, Bs.

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the request of others interested, or of the defendant himself. If the mere fact of no road being made is sufficient to authorise him, he may cross at as many places, and break as many fences as he likes; so also might the occupiers of land along the whole line; and the danger to the public would be immense. Where the Company buy land, they have a right to expect it free from all incumbrances—any right of road or claim whatever: the language of section 63, and the form of conveyance there given, shew this. And by section 78, if the landowner suffer any damage by *severance* he is to be paid for it; this party therefore must have received compensation for the severance mentioned in the plea. The Company, having so bought the land, fence it off, and appropriate it to the purposes of the railway only. They ought not at least to be subject to any incumbrance without notice of it. Sections 186 and 187 shew, that, as a general rule, private individuals, cattle, &c., are prevented being on the railway under a penalty. The only exceptions are—"where places are appointed as aforesaid," and where the parties are "authorized as aforesaid," that is, by agreement. Here there is no appointment or agreement; and the question then comes, what is the meaning of the words—"places appointed as aforesaid," and "authorized as aforesaid"? [*Alderson*, B.—According to that construction of the section, they could only pass at places *then*, not afterwards appointed. *Parke*, B.—The question seems to be, which party is to take the initiative step.] Section 180 enables landowners, as soon as the railway is formed, to apply to justices, and obtain either gates, or a communication by means of a bridge, &c., between the lands on each side; which gates or communications are to be maintained at the expense of the Company: under this section the application is expressly to be made by the landowner; and the Company are not obliged to make them *forthwith* after the making the railway, but after an adjudication of the magistrates. Section 181

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contemplates the possibility of the gates, &c., being insufficient for the occupation of the land, and therefore enables landowners, after giving notice to the Company, to make, with the consent of the justices, other communications at their own expense. Section 182 also empowers landowners to require the land to be fenced off from the railway at the expense of the Company, instead of requiring gates, &c., and gives to the justices by the last clause the same power over the fences as section 180 did over the gates and communications, and authorizes the Company to fence it off, if no request be made for gates, and they choose fences instead of gates; but in either case, if the landowners require one or more gates, they have the same power of enforcing them as is given them by section 180. [*Parke*, B.—This party brings himself within the 183rd section.] He may be within the words of it, but not the meaning. Section 183 is a proviso on the previous sections, and the word *necessary* in it must be imported into the other. It is intended to give an exemption from toll in cases where the cattle would pass over the railroad itself; and, therefore, principally points to cases where the railway is on a level, or nearly so, and gates only are made at the expense of the Company, and a passage only is required to be appointed by the justices, and no further communication is requested by the landowners, nor any further expense incurred by the Company. This appears from the marginal note—"Owners and occupiers to pass along railway without payment of toll;" and the exception in the clause, of "cases in which the said Company shall, at their own expense, have made communications according to any agreement with the owner or occupier of the land, or according to the provisions of this act;" which obviously means, when something else than merely appointing a particular line of passage across the railway has been done. It does not say distinctly "in all cases;" if it had, it would have contradicted the former sections; but reading it thus,

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it is consistent with all, and means that when it is necessary for the landowners to cross the railway, as in cases where the line is across the railway, and gates have been directed by justices to be made, or places appointed for crossing, or any other way which has been directed by justices is making, the landowner may cross without payment of tolls. But in this plea there is no averment of the railway being on a level, or of the appointment by the justices, or of any request to make gates or fences. On the contrary, it is rather to be assumed that the Company had thought proper, under section 182, to make both gates and fences. It justifies the destruction of both. The necessary gates and stiles in that section do not apply to this case; no necessity is averred, and that must be judged of by the justices. Hence there should be an application, or the Company cannot know that a communication is required; and even if one were made at a great expense, yet, if not made by agreement, or under an order, the party might still break down fences. If the Company had refused to make necessary gates, the applicant would have had to go before the magistrates, under the express language of section 180; and *à fortiori* he ought to do so when he wants them, for the non-making by the Company can amount to no more than a continued refusal. Then section 186 is most distinct, that if any person shall cross the railway with cattle, he is subject to a penalty. Section 183, therefore, applies to those cases only when it is proper to be *on* the railway. This is not one of those cases, and therefore judgment ought to be for the plaintiffs.

Crompton, contrà, was stopped by the Court.

Lord ABINGER, C. B.—It is a well understood rule, that, if a party seek to avail himself of a particular clause in an act of Parliament which contains an exception or proviso, he ought to negative that exception or proviso in his plea,

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but not so if it is in a different clause. Here the defendant has a complete defence under one clause; and if the case comes within any exception or proviso in another clause, the plaintiffs ought to have replied it, and shewn that the defendant was not at liberty to cross the railway. The plea follows the language of section 183; and if there are any circumstances shewing that clause not applicable, or bringing the case within any other section, those matters should have been replied. I think the intention of the legislature was to do as little damage as possible to private interests. The Company may take a man's land, but must make communications for him: if the owner is dissatisfied with them, he may apply to the magistrates to get their determination as to what is a proper communication; but he is not bound to do so in the first instance. If they make no communication, he may go where he likes; but if they make one of which he disapproves, he cannot cross at any other place, but must go before the magistrates. Until the Company make a communication, the necessity for his going does not arise. I think, therefore, that the plea is good.

PARKE, B.—I entirely concur with the view taken by the Lord Chief Baron. This is a case distinctly within the 183rd section, which comes by way of proviso to the former section, and gives power to the owner or occupier of land *for the time being* (not at the time of severance) to cross the railway from one part of a close separated by the railway to another, provided he does not impede the traffic; and that right he has until a communication is made by the Company. That is the plain construction of the section. Unfortunately, all will not bear the same grammatical construction: for instance, the 186th must be qualified to make it sense; it is impossible that it should be construed literally, for it imposes a penalty on all persons using the railway as a passage for horses and cattle, except in cross-

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ing the same at the places to be appointed for that purpose, for the necessary occupation of the respective lands through which the railway shall pass. Now it is evident from other parts of the act, that these parties would have a right to pass over the railway with their cattle, &c., if no regular place of passage were appointed; to make sense, therefore, the words, "places to be appointed," must be read with the addition, "when such places shall have been appointed." It seems to me that it is sufficient for us at present to say that this case is brought within the 183rd section; and I agree, that if it would be an answer to the plea (which I do not think) to say that a requisition to the Company to make a communication is necessary, it ought to come by way of reply from the other side. Until the communication is made, a party has a right to pass from his property on one side to that on the other.

ALDERSON, B.—I am of the same opinion. Section 183 gives a landowner a general power to pass any where over the railway, till the Company, under the powers of their act, choose to restrain him to a particular place.

ROLFE, B., concurred.

Judgment for the defendant.

COURT OF QUEEN'S BENCH.

Sittings after Easter Term, 1841.

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May 10th.

THE QUEEN *v.* THE BRISTOL DOCK COMPANY.

THIS was an appeal to the Bristol quarter sessions, April, 1839, against a rate made the 8th November, 1838, for the relief of the poor of the parish of Clifton, whereby the Bristol Dock Company were assessed, as occupiers, for Cumberland Bason, entrances thereto, quay walls, wharfs, locks, and dock gates, at a rental of £1350, in the sum of £54. It was agreed that the Company should be taken to have ratable property in the said parish to the amount of £300, and that the rate should be reduced from £54 to £15, subject to the opinion of the Court of Queen's Bench upon the following case; which was stated for the purpose of raising the question whether the Dock Company were ratable, as above-mentioned, in respect of certain tolls payable to them by vessels entering the port of Bristol.

By 43 Geo. 3, c. 140, s. 1, reciting that vessels lying at the quays in the port of Bristol were, by the reflux of the tide, left dry twice in every twenty-four hours, whereby favourable winds were often lost, and vessels lying in the

By the Bristol Dock Act (43 Geo. 3, c. 140, local and personal, public) a Company were empowered (amongst other works) to convert a portion of the river Avon into a floating harbour, and to make a new course for the river, and a bason to connect the new course with the floating harbour. And sect. 74 enacted, that certain rates and duties should be payable to the Company for every ship or vessel *entering into the port* of Bristol, to be

applied for the purposes of the act, that is to say, by s. 25, after paying interest and expenses of repairs, &c., the surplus was to be divided among the subscribers. The port of Bristol is entered in the river Severn, several miles from the parish in which the bason is situate.

Section 64, reciting that the lands to be taken for the above purpose would, during the time the said intended works were carrying on, and for many years after, be rendered unproductive and incapable of being rated in aid of the land and parochial taxes, enacted that the Company should become chargeable from the time of their entering into and taking possession of such lands, &c., with all such land and parochial taxes as the same lands and premises then were or might thereafter be subject to.

Held, that no portion of the dues payable by ships on entering the port was a profit arising from the bason, and that the bason was ratable to the relief of the poor as ordinary land.

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port could not be removed out of danger in case of fire; and in case of fire among the houses in the city of Bristol great loss might be experienced from want of water; and that these inconveniences might be remedied by cutting a new course for the river Avon, on the Somersetshire side, in the line and in the manner therein described, by erecting two dams across the old course of the Avon, with a lock in positions therein mentioned in Somerset and Bristol, and by making an *entrance bason* (the bason above mentioned as Cumberland Bason) and locks in Rownham meads in the parish of Clifton, and an entrance bason (hereinafter called Bathurst Bason) and locks at Trym Mills, between the then present and intended course of the Avon, and also by executing divers other works therein described; and reciting that £250,000 had been subscribed as a joint stock; a Company of proprietors of the works thereby authorized was constituted, to be called "The Bristol Dock Company."

By sect. 20, the sum of £250,000, so subscribed, was declared to be insufficient, and the Company were enabled to borrow £50,000.

By sect. 30, the Company were required to cut the new course for the river, and to make the dams and basons above mentioned, so as to dam up a certain portion of the old course of the river running through the city of Bristol, and convert it into a floating harbour, from which the spring tides should be excluded, and made to flow through the new course of the river; and by means of the said two basons to afford a passage for shipping from the said new course to the floating harbour.

They were also, by various other sections, required to make various other works, such as cuts, drains, locks, bridges, and a towing path, in other parts of the port and in other parishes.

By sect. 39, they were required to deepen the beds of the rivers Avon and Froome in such parts thereof as might

be necessary for the accommodation of the trade of the port of Bristol.

By sect. 64, after reciting that by the making and using the entrance bason, new course of the river, and other works, certain lands in Clifton, Bedminster, Brislington, Keynsham, St. Philip, and St. George, which at that time were rated to and paid the land and parochial taxes in the same parishes, would, during the time the said intended works and alterations were carrying on, and for many years after, be rendered unproductive and incapable of being rated in aid of the said land and parochial taxes, by which means a greater burthen must be laid on other lands in the same parishes, it was enacted that the appellants should become chargeable from the time of their entering into and taking possession of such lands, tenements, hereditaments, and premises, with all such land and parochial taxes as the same lands and premises then were or might thereafter be subject to, and that the fund of the Company should become liable to pay such land and parochial taxes then charged, or thereafter to be charged, on the same land and premises during the execution of the works, and for ever thereafter.

By sect. 74 it was enacted, that from the expiration of twelve calendar months after the works thereby authorized should have been begun, there should be payable and paid by the Company, for every ship or vessel entering into the port of Bristol, except barges or other vessels passing to or from the Bath river navigation, and not discharging any part of their cargoes at the quays at Bristol, the several rates and duties thereinafter particularly rated and described, to be applied by them for the purposes of the act; and (by sect. 75) for all goods, merchandizes, &c. whatsoever, imported from parts beyond seas, but not brought coastwise or by inland navigation into the port of Bristol (except certain articles of provisions), the several rates and duties particularly specified in the schedule to the said act.

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By sect. 25, the surplus fund, after discharging the interest of money borrowed, and the expenses of repairing and preserving the cuts, drains, locks, bridges, towing paths, and other works, was to be divided annually among the subscribers, not exceeding 8 per cent. per annum.

By a return made in Trinity Term, in the 10th Geo. 1, to a commission issued out of the Exchequer on the 15th February preceding, in pursuance of the 14 Car. 2, c. 11, it appeared that the limits of the port were assigned to be from the westwardmost parts of the Flat and Steep Holmes (two islands), up the course of the channel eastward to Aust, in the county of Gloucester, and from the said Holmes southward across the channel to a place called Uphill, which was included, and from thence along the coast or shore eastward, in the counties of Somerset and Gloucester, to Aust aforesaid, and also from a place called the Hole's Mouth, in Kingroad, up the river Avon, to the said city of Bristol, together with the several Pills lying upon the said river.

Under the powers vested in them, the Company, in 1804, purchased and took possession of land in the parish of Clifton, called Rownham Mead, which at the time of their so taking it was pasture land, of the yearly value of 44*l.* 18*s.* 6*d.*, and paid land tax, and were assessed to and paid parochial taxes for it as being of that value, and if the same land had still continued to be and now were in the like state of pasture land, it would be of the value of 67*l.* 7*s.* 9*d.* The Company contended that they were liable to be rated for these lands according to the latter value. The greater part of this land was covered by the entrance Bason, called Cumberland Bason, and walls thereof, &c.

The Company executed the works prescribed by the act; the effect of which was that all the parts of the river adjacent to wharfs and quays at Bristol, which were formerly left dry at the ebb of the tide, are now kept full of water

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at all times of the tide, so that vessels are kept afloat therein and can be moved about at pleasure, and the parts so floated are called the Floating Harbour.

Cumberland Bason, and the other bason called Bathurst Bason, situate in another parish, are so constructed as to afford to vessels an entrance and passage from the new course of the river (wherein the tide ebbs and flows) into the floating harbour, which, except when occasionally emptied for cleansing, is kept permanently full; and these two basons are necessary and were constructed for that purpose, and in order that a vessel may get to these quays at Bristol it is necessary that she should pass through one or the other of these basons. A very principal part of the vessels coming to discharge goods at the quays of Bristol, including most of the West Indiamen and other large vessels, and the greater part of the timber trade, are now admitted into the floating harbour through Cumberland Bason, and that bason is necessary for the superior foreign trade; but a considerable portion of the trade, including occasionally large vessels at spring tides, and nearly all the coasting vessels at all times, and a portion of the timber trade, are admitted into the floating harbour through Bathurst Bason.

For the accommodation of the trade and of the steam-packets frequenting the port, the Company have permitted the walls of Cumberland Bason to be used as quays, for which they received in the course of the year £311, but no toll or duty for such landing is given by the act. [As to this sum of £311, no question arose on argument, the case stating that the costs of repairing the bason, *communibus annis*, would exceed this sum. The question therefore stated by the sessions as to this part of the case has been omitted.]

The extent of the port of Bristol is in length, from a point between the two islands, called the Holmes, to Aust, twenty-seven miles; from the place called the Hole's Mouth,

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or the Mouth of the Avon, up to Cumberland Bason, is six miles, and from thence to Tower Harrats, the eastern extremity of the port, is two miles and a quarter. The distance from the Steep Holmes across the port eastward to Uphill, is four miles and a half; and the area of the port within these limits is 43,555 acres, of which the land taken by the Company in Clifton, supposing it to be twelve acres, would be the 3629th part only. The port of Bristol, including the space between high water and low water mark, extends into the parishes of Uphill, Weston super Mare, Wick St. Lawrence, Kingston Seymour, Clevedon, Walton, Portishead, Easton in Gordano otherwise St. George's, Abbots Leigh, and Long Ashton, in the county of Somerset, and Henbury, and Westbury upon Trym, in the county of Gloucester, and the parishes of St. Augustine, St. Stephen, St. Thomas, Temple otherwise Holy Cross, St. Mary-le-port, St. Leonard, St. Nicholas, St. Philip and Jacob, Redcliff, and Clifton, in the city of Bristol, and into such parts of the parishes of Bedminster and Brislington as lie in that city.

The dock dues are demanded and collected from vessels discharging goods at Uphill, Weston super Mare, Portishead, Aust, and all intermediate places on the coasts of Somerset and Glocestershire, along the sides of the rivers Severn and Avon, within the limits of the port, from small vessels which habitually discharge their passengers at Rownham below the locks and Cumberland Bason, and which do not enter the bason, and from "The Great Western" steam vessel trading to New York, which never enters Cumberland Bason, nor approaches nearer to it than Kingroad, upwards of six miles distant, and from other vessels entering and trading within the port and lying in Kingroad, which is a principal place of anchorage in the Severn for vessels entering into and sailing from the port of Bristol, and for vessels anchoring and trading in other parts of the port. The collector demanded and received

the duties upon the vessels entering and trading within the port, as constituting their liability thereto, without reference to any particular part of the port, and without inquiring whether the vessel was discharged, and that alike whether they went up to the quays of Bristol through Bathurst Bason, or through Cumberland Bason, or whether they discharged in that bason, or whether they never entered either of the basons at all. The duties collected from vessels not entering one or the other of the said basons for the purpose of discharging their cargoes, but discharging their cargoes in any of the remoter parts of the port, are trifling compared with the aggregate amount of the duties. No part of the rates and duties imposed by the act, nor any money, except the above-mentioned 311*l.*, is collected by the Company within the parish of Clifton. The principal part is received at the Bristol custom-house in the parish of St. Nicholas in the city of Bristol, and the residue (collected at the distant parishes in Somerset and Gloucester) has been received by the agents there for the principal collector.

The whole of the works executed by the Company, and upon which their funds have been expended (except only the towing path along the banks of the river Avon) lie within the present boundaries of the city of Bristol.

If the Court of Queen's Bench should be of opinion that the Company were rateable in the parish of Clifton, in respect of the land in that parish so taken as above mentioned, or any of it, and by reason of their receipt of the whole or any proportion of the rates and duties imposed by the said act on vessels entering into the port of Bristol, and of the rates and duties thereby imposed on goods, wares, and merchandize imported from parts beyond the seas, but not brought coastwise, or by inland navigation, into the port of Bristol, or either of them, then by agreement the property of the Company in Clifton for the purpose of the present rate is to be taken as being of the rate-

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able value of 300*l.* as above mentioned, and the appeal to be dismissed.

If the Court should be of opinion that the Company were not liable to be rated in respect of the said land, either for, or in proportion to the said rates and duties, or any portion thereof, but that they were liable to be rated in respect to the said land so by them taken in Clifton, after the rate which the same would now be worth to let at, in case the same were now in its original state of meadow or pasture land, and with reference to the land so let in the immediate vicinity, then the appeal is to be allowed; and the assessment on the appellants is to be reduced to 3*l.* 7*s.* 6*d.*, being 1*s.* in the pound on 67*l.* 7*s.* 6*d.*, the present rateable annual value of such land in such state &c., and the appeal to be allowed.

Sir *F. Pollock*, *Erle*, and *Hodges*, in support of the order of sessions (*a*).—The Company are rateable to the parish of Clifton for Cumberland Basen, according to the profits arising from the basen in respect of the tonnage dues. Before this act passed there was no artificial port; by it great powers were given to the Company to raise money for making a floating dock and other works, in order to secure an adequate depth of water at all times of the tide, and the basen in question is necessary as an entrance into the dock from the new cut. The basen, therefore, is part of the works, as a mode of remuneration for the expense of which the tolls were given, being the consideration and meritorious cause which induced the legislature to grant the powers; and therefore the parish in which it is situate is entitled to rate them for a portion of those profits. Nor is it any objection that the dues are payable on a ship *entering* the port at a distance from the parish.

(*a*) April 24th, before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Wightman*, Js.

In *Rex* v. *Barnes* (*a*) the Hammersmith Bridge Company were held rateable in Barnes for a portion of the tolls taken in Hammersmith; *Bayley*, J., says there, "All that we decide is, that the land is rateable property in the place where it is situate. There the profit is earned, though the money may be actually received elsewhere;" and *Rex* v. *Woking* (*b*) shews that there may be a source of property in one parish A., used in a second B., but which running through a third C., would be rateable in C.

If then tonnage dues are granted in respect of this land, the question is whether the proceeds are to be distributed over the area of *the port* in its extended legal signification, or the limited and artificial one. Before the case of *The Dock Company at Kingston-upon-Hull* v. *Browne* (*c*), there was a doubt whether that Company were not chargeable for every vessel that entered the natural port, that is, district: but the judgment there went to this, that by the *port* of Hull in the 14 Geo. 3, c. 56, s. 42, was meant the popular or limited sense. [*Patteson*, J. The first word used in that section is *harbour*, that is one reason why the Court so held it.] Harbour, port, and dock, are used as synonymous terms in the 43rd section. The cases relating to the Hull Dock Company are expressly in point; there is the same consideration and the same privileges, and tolls are taken in the same way in respect of cargoes landed and ships coming into port. In *Rex* v. *The Dock Company of Hull* (*d*), lands purchased by the Company, and converted into a dock, according to an act of Parliament which declares that the shares of proprietors shall be considered as personal property, were held rateable to the poor in proportion to the annual profits. [*Patteson*, J. I think that case did not decide anything about the proportions, only that they were rateable.] It settled the rateability. Then in *Rex* v. *The*

(*a*) 1 B. & Ad. 113.
(*b*) 4 A. & E. 40.
(*c*) 2 B. & Ad. 43.
(*d*) 1 T. R. 219.

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Hull Dock Company (*a*), it was again decided that they were rateable in respect of the tonnage duties received by virtue of the act, though the expenditure for repairs during the period for which the rate was made exceeded the amount of the duties received.

It is to be contended by the appellants that this land (if rateable at all) is rateable only as meadow. Section 64 contemplated that for a considerable time it would yield no profit, and prevented it from affecting neighbouring lands by being exempted from rate; but it says nothing about future rates being limited or altered in amount. The profits are given to the Company who purchase the land in consideration of the intended works; those profits, by section 64, are tonnage dues on every ship coming into the port, and are to be received by private proprietors to the extent of 8 per cent. There is no distinction as to whether vessels enter the dock or not. They also cited *Rex* v. *The Grand Junction Canal Company*, (*b*), and *Rex* v. *The Birmingham Canal Company* (*c*).

Sir *W. W. Follett* and *Davison*, contrà.—As to the first question, whether the Bristol Dock Company are to be rated in Clifton in respect of a portion of the dues or tolls payable for entering the port of Bristol, that is, whether those dues are a profit arising in the district in which the assessment is made (*d*), it has not been contended, that in *form* any rate could be laid upon those tolls or dues, but that a rate might be laid on Cumberland Bason at a value enhanced by the amount of them. *Rex v. Nicholson* (*e*). The claim in substance is to rate in respect of all tolls paid by any ship for entering the port, that is for passing the Holmes, though she may never come into the Avon. None of the toll is paid in Clifton, nor in respect

(*a*) 5 M. & S. 394.
(*b*) 1 B. & A. 289.
(*c*) 2 B. & A. 570.
(*d*) 1 Nol. P. L. 207.
(*e*) 12 East, 330.

of the use of any land in Clifton. The Company are entitled to it, whether the ship does or does not enter the dock. It is not even claimed upon any suggestion of the use of the land in which the dock is; indeed "The Great Western" and other vessels neither do or can come up to the dock, but remain outside the Avon in King-road. The toll, then, in this case is certainly not payable in respect of the use or occupation of any real property in Clifton. In reality it is payable by ships, not for the use of the dock or bason, but of certain works which the proprietors of the dock have done upon the port. In *Rex* v. *Coke*(*a*), where it was held that a lighthouse was not rateable for its tolls in the parish where it was situate, *Littledale*, J., says, speaking of the cases relating to the rateability of tolls, "In all these cases the profit has arisen, and the use of the thing out of which they have arisen has been in the place or district where the rate is made. Here the profits do not arise, nor does the use of the light take place in the parish of Lydd." See also *Rex* v. *Fowke*(*b*), and *Rex* v. *The Inhabitants of Lower Mitton*(*c*). The profit in this case has no necessary connection with the land rated, and *Rex* v. *The Undertakers of the Aire and Calder Navigation*(*d*) shews, that profits granted in compensation for the subject-matter of the rate are not rateable with it, nor unless they arise directly from the use of it.

Reliance has been placed by the respondents on *Rex* v. *Barnes*(*e*); but that case is not inconsistent in principle with those on which the appellants found their claim of exemption. *Littledale*, J., says there, "The tolls are payable for passing over the bridge, not for passing through the toll-gates." The answer to the case of *The Dock Company at Kingston upon Hull* v. *Browne*(*f*) is, that there no

(*a*) 5 B. & C. 797; S. C. 8 D. & R. 666.
(*b*) 5 B. & C. 814 (*a*).
(*c*) 9 B. & C. 810; S. C. 4 M. & R. 711.
(*d*) 3 B. & Ad. 533.
(*e*) 1 B. & Ad. 113.
(*f*) 2 B. & Ad. 43.

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such question as the present was raised even in argument, far less decided, or even remarked on by the Court. And in *Rex* v. *The Dock Company of Hull* (*a*), and *Rex* v. *The Hull Dock Company* (*b*), it is clear that the rates were levied in respect of the profits of land situate in the parish itself. By that act too (14 Geo. 3, c. 56, s. 42), the dues are granted expressly in consideration of the expenses of the works, and for every vessel coming into or going out of the *harbour, bason, or dock* within the port of Kingston upon Hull, and the word "port" was construed to mean the artificial harbour, and not the natural and extended sense. In this case there is nothing to point out such a construction of the word "port."

But independently of the principle, where is the possibility of such a rate? If the Company are to be rated to Clifton, then, according to the argument, they must also be rated in every parish in which the port is, that is, in twenty-four parishes. But in what proportion? Is it to be in proportion to the length of the line of the port in each parish, as in the case of canals? *Rex* v. *Woking* (*c*) The dues are payable, not for passing along the port as a canal, but for entering the harbour. And in many of these parishes the Company have not a single acre of land; nor can it make any difference that in Clifton they have some land, unless it is land in respect of the use of which the tolls are payable. It has been suggested, that a number of acres which formerly contributed to the rate have been taken out of the parish of Clifton, so that a loss has been sustained by the other rate-payers. But the act expressly provides (s. 64), that such land shall be rated in the proportion in which it was before, and that before the completion of the works, and not in an increased value in respect of a special application of the land to dock works; so that any argu-

(*a*) 1 T. R. 219. (*b*) 5 M. & S. 394.
(*c*) 4 A. & E. 40; S. C. 5 N. & M. 395.

ment founded upon a supposed loss in this respect is answered by the act itself. The rate, therefore, ought to be reduced to that amount at which it would have stood if the land had remained meadow, as it was before the act passed.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This case comes before us upon an appeal by the Bristol Dock Company, against a rate made for the relief of the poor of the parish of Clifton, wherein the said Company was assessed in a certain sum for Cumberland Bason, entrance to bason, quay, walks, wharfs, lock and dock gates. Upon the hearing of the application, a case was stated for the opinion of this Court; from which it appears that the said Company was formed under an act of Parliament, for the improvement of the port and harbour at Bristol. By virtue of this act the Company was invested with various powers for the effecting of such purposes. Accordingly the Company purchased about eleven acres of land, in the respondent parish of Clifton, and made the works upon which the assessment has been made. It is further stated, that the port of Bristol extends over more than thirty parishes, including the respondent parish of Clifton, and that the tolls and dues, in respect of which it is sought to assess the appellants, are imposed upon every vessel entering the port of Bristol, and are collected in different parts of the port of Bristol, out of the said parish of Clifton. It is stated, however, that no part of the said tolls or dues, except the sum of £311 (as to which no question arises), is received by the appellants within the parish of Clifton, and further, that in many (if not most) of the said parishes, composing the port of Bristol, the Company has no property whatever.

Upon this state of facts, we have to consider whether the Company ought to be rated in respect of the property

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above described, in the same proportion "as other land in the immediate vicinity, in its original state as meadow or pasture land," or with the addition of all or some proportion of the said tolls and dues so collected within the port of Bristol.

This question divides itself into two parts: first, whether by virtue of the said act the Company is made rateable in the latter manner; and if not, whether it be so by virtue of the law generally applicable to the rating of property of this description.

The first question turns upon the 64th section of the act, which especially refers to the manner in which the Company is to pay land and other taxes; the other sections to which we were referred in the argument, respecting principally, if not entirely, the manner in which the act was to be carried into effect. (His Lordship read the section.) We think that this enactment falls much short of charging the Company with liabilities respecting the tolls and dues in question. For first, if it had been meant to charge the Company with such additional liabilities, it is hardly probable that the property used would have been described as rendered unproductive and incapable of being rated during the work and for many years afterwards: because the nature of the works (as described in the act) being to make a more commodious communication with the port of Bristol, and generally to improve the same, if the tolls and dues therein received had become liable to the rate, some profit at least must have been expected, immediately upon the completion of the works and the use of the bason entrance; and indeed the act gives the tolls to commence at the end of twelve months from the commencement of the works. Moreover, the mode of rating upon the then state of the property is expressly declared to be the mode to be adopted "for ever thereafter."

The question then is, whether this property be liable to be rated at the increased value, independently of the ope-

ration of the said act. Upon this point, since the decision of the cases of *Rex* v. *Nicholson* (*a*) and *Williams* v. *Jones* (*b*), the principle upon which the rate upon tolls is to be imposed has been fully established, though the application of that admitted principle to each particular case may not always be easy—it is this, that the tolls are rateable as profits of land, occupied within the parish, for which the rate is imposed, and agreeably to it Water Companies have been rated, *Rex* v. *The Corporation of Bath* (*c*). So also Gas Light Companies, *Rex* v. *The Birmingham Gas Light and Coke Company* (*d*), and Canal Companies, *Rex* v. *Woking* (*e*). In all these cases, and in many others, to which, in a matter not now to be disputed, it is not needful to refer, the rate is imposed in respect of profits *arising within the parish*. Whether this principle, so established in these cases, would, without further authority, necessarily exclude the consideration of profits arising *elsewhere*, it is not necessary to consider; because we find the principle, so extended, expressly recognised, and the reasons for it most fully given, especially by *Bayley*, J. and *Littledale*, J., in the case of *Rex* v. *Coke* (*f*), where the tolls of a light-house were held not rateable, because they accrued out of the parish. It was further added, by both those learned Judges, that in the cases to which we have above generally referred, "the profits have arisen, and the use of the thing, out of which they have arisen, has been in the place where the rate is made." This question again came before this Court in the case of *Rex* v. *The Undertakers of the Aire and Calder Navigation* (*g*), and the same principle was again recognised by the Court, in a short judgment, probably because the subject was considered as exhausted by the reasoning of the two learned

(*a*) 12 East, 330.
(*b*) Id. 346.
(*c*) 14 East, 621.
(*d*) 1 B. & C. 506, S. C. 2 D. & R. 735.
(*e*) 5 N. & M. 395; S. C. 4 A. & E. 40.
(*f*) 5 B. & C. 797; S. C. 8 D. & R. 666.
(*g*) 3 B. & Ad. 533.

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Judges above referred to, which was expressly brought under notice and relied upon in the course of argument.

Upon the whole, we are of opinion that the assessment should be reduced to the sum of 3*l.* 7*s.* 6*d.*, being after the rate of 1*s.* in the pound on 67*l.* 7*s.* 6*d.*, "the present rateable annual value of the property in question as land."

COURT OF QUEEN'S BENCH.

Sittings after Easter Term, 1841.

May 10*th*. THE DUNDALK WESTERN RAILWAY COMPANY *v.* TAPSTER.

By a Railway Act (1 Vict. c. xcv, s. 75), it is enacted, that in case any owner of a share shall neglect or refuse to pay the calls upon it, it shall be lawful for the Company to sue for and recover the same in any of her Majesty's Courts of Record in Dublin; and sect. 77 gives a concise form of declaration, "that the defendant is indebted for calls &c." without setting forth the special matter.

DEBT. The declaration stated that the defendant heretofore, to wit, on &c., then being a proprietor of divers, to wit, ten shares in the undertaking mentioned in a certain act of Parliament (1 Vict. c. xcvi), being an act for making and maintaining a railway from the town of Dundalk, in the county of Louth, to the town of Ballybay, in the county of Monaghan, was indebted to the said Company in a large sum of money, to wit, £50, for divers, to wit, two calls of 2*l.* 10*s.* each call upon each of the said shares in the said undertaking, whereby &c. Plea—The said defendant in his own person comes and says, that this

To a declaration under the latter section in an action for calls brought in England, the defendant pleaded "that this Court ought not to take further cognizance of the action, because it is enacted by the said statute (sect. 75), that in an action for calls, it shall be lawful for the said Company to sue for and recover the same in any of her Majesty's Courts of Record in Dublin, and that he was therefore liable to be sued in those Courts, *and not elsewhere*; and this the defendant is ready to verify; therefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid."

Held, on demurrer to this plea, that although in form a plea to the jurisdiction, yet as it disclosed matters in bar of the action, it might be made use of for that purpose; and that therefore the declaration was open to the objection of being bad at common law.

And that the plaintiffs not having followed the remedy given by the act, could not avail themselves of the concise form of declaring given by that act.

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Court ought not to have or take further cognizance of the action aforesaid, because he says, that in and by the said act of Parliament in the declaration mentioned (*a*), it is enacted and provided, amongst other things, "that the directors therein mentioned shall have power from time to time to make such calls of money from the proprietors of the said undertaking, to defray the expenses of, or to carry on the same, as they from time to time shall find necessary for those purposes, so that no such call shall exceed the sum of money therein mentioned, and that every owner of any share in the said undertaking shall pay his rateable proportion of the monies to be called for as aforesaid to such persons and at such times and places as the said directors shall from time to time direct and appoint; and if any owner of any such share shall not so pay such his rateable proportion, then, and in such case, and so often as the same shall happen, such owner shall pay interest for the same after the rate of £6 per cent. per annum from the day appointed for the payment thereof, up to the time when the same shall be actually paid. And if any owner of any such share shall neglect or refuse so to pay such his or her rateable proportion, together with the interest, if any accrued for the same, for the space of two calendar months after the day appointed for the payment thereof, then it shall be lawful for the said Company or for the said directors to sue for and recover the same in any of her Majesty's Courts of Record in Dublin, in manner in the said act mentioned." That before and at the time of making the said calls in the declaration mentioned, and before and at the time of commencing this suit, he the defendant was such proprietor of shares as in the declaration and the said act mentioned, and that he then was and still is subject and liable to be sued upon, and for, and on account, and in respect of the causes of action in the

(*a*) Section 75.

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declaration mentioned, in her Majesty's said Courts of Record in Dublin, *and not otherwise or elsewhere.* And this the defendant is ready to verify; wherefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid.

General demurrer. And the plaintiffs say, that notwithstanding anything above pleaded by the defendant, the Court here ought to have further cognizance of the action aforesaid, because they say that the said plea and the matters therein contained are not sufficient in law to oust the Court here from having or taking further cognizance of the aforesaid action, and that they the plaintiffs have no occasion, nor are they bound by the law of the realm to answer the said plea in manner and form as the same is above pleaded. And this they are ready to verify; wherefore they pray judgment, and that this Court will have and take further cognizance of the said action, and that the said defendant may answer over to the declaration of the plaintiffs. Joinder in demurrer.

The points marked for argument by the plaintiffs were, that the defendant's liability to be sued, upon and for the causes of action in the declaration mentioned, is not limited by the 1st Vict. c. xcvi, to the Courts of Record in Dublin, and that by law as well as by the said statute this Court has jurisdiction over the causes of action in the declaration mentioned, and is not deprived of such jurisdiction by the said statute or otherwise.

The defendant will object to the declaration, and contend that even if he be liable to an action in this country, the declaration must shew consideration for the debt, and must be a good declaration at common law (*a*).

(*a*) By the 1 Vict. c. xcvi, s. 74, it is enacted, "that in case any party shall refuse or neglect to pay the money by him so *subscribed for*, or the part thereof so called for, at the time and in the manner required for that purpose, it shall be lawful for the said Company to sue for and recover the same in any court of law or equity, together with interest," &c.

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Cleasby, for the plaintiffs (*a*).—There is nothing in this, which is a public act, to shew this action is not maintainable in the Courts of Record at Westminster. Section 75, which gives power to make calls, enacts, "that if they are not paid, the directors may sue for them, or declare the shares to be forfeited, and sell them." Stopping there, and passing over for a moment the enactment as to bringing the action in Dublin, section 77 gives the form of declaring in any action for calls, and the evidence necessary to support it. These calls form a debt to the Company, and have been so held by *Tindal*, C. J., in *The London and Brighton Railway Company* v. *Wilson* (*b*). The defendant relies on the words in section 75, "it shall be lawful for the Company, or the directors, to sue for and recover the calls in any of her Majesty's Courts of Record *in Dublin*, by action of debt, or on the case, or by bill, suit, or information, wherein no essoign, wager, or protection of law, or more than one imparlance shall be allowed." The Company do not seek to sue them in any of these particular ways, but merely according to the course of common law, giving them as many imparlances &c. as they would otherwise be entitled to. [*Patteson*, J.—The difficulty is how you are to sue them at all at common law; they are partners.] The plaintiffs are made a corporation by the act, and therefore the objection of partnership cannot arise; moreover, the question of the validity of the declaration cannot be considered on a plea to the jurisdiction. 1 Chitty on Pleading, 465. The issue joined here, is, whether this Court shall take cognizance of the subject-matter, and there is nothing in this section to prevent the jurisdiction of the superior Courts, which can only be taken away by express words or necessary implication, as in *Cates* v. *Knight* (*c*), *Shipman* v. *Henbest* (*d*); here there are

(*a*) Before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Wightman*, Js.

(*b*) Ante, Vol. 1, p. 533.

(*c*) 3 T. R. 442.

(*d*) 4 T. R. 109.

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no words taking away the jurisdiction, and the implication is the other way. In transitory actions there is no such thing as a plea to the jurisdiction, on the ground that the subject-matter is one in respect of which no action can be maintained in the superior Courts. If it be a plea at all, it amounts to a plea in bar. There may be such a plea on the ground that the cause arose within counties palatine. Tidd's Practice, 631. In local actions you may have a plea to the jurisdiction by reason of the subject-matter. Suppose there had been a clause to say this action should not be tried in this Court, that could not have been taken advantage of by plea in abatement, but in bar. If it appeared upon the record (in the declaration for instance), that this action was in respect of something for which an act of Parliament had provided that no action should be maintained, the Court could not, upon a plea to the jurisdiction, give final judgment for the plaintiffs or against them. It is clear the subject-matter of a plea to the jurisdiction cannot be taken advantage of except by such a plea. Bac. Abr. "Courts," D. 3. A plea to the jurisdiction does not amount to saying the action is not maintainable in the superior Courts, but that the defendant has an option to have it tried elsewhere; if he does not exercise that option, this Court may entertain it, *Davis* v. *Stringer* (*a*), *Parkes* v. *Elding* (*b*). In that last case it is to be observed, that although the marginal note omitted the words "in the King's Courts at Westminster," they appear in the act of Parliament, therefore the cases are identical. That has been referred to in a late case in this Court, *West* v. *Turner* (*c*), and in *Rex* v. *Johnson* (*d*). These shew that, if anything, it is a defence to the action. This is therefore a bad plea to the jurisdiction: it gives no better suit.

Kelly contrà.—The preliminary question is, whether this

(*a*) Carth. 354.
(*b*) 1 East, 352.
(*c*) 6 A. & E. 614.
(*d*) 6 East, 583.

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can properly be called a plea in abatement, containing matter in bar of the action. In 1 Chitty on Pleading, 6th ed. p. 446, it is said,—"Whenever the subject-matter of the plea or defence is, that the plaintiff cannot maintain any action, at any time whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar." It is true that mistakes in a declaration cannot be taken advantage of on demurrer to a plea in abatement; Lutwyche, 1592, 1667; 1 Salk. 212; Carth. 172; but where matter has been pleaded in abatement which might also be pleaded in bar, it is different. Lutwyche, 1604 (*a*). Here it might, for it is a statement in answer, not that he has been misled, but that in no form or way can this Court give judgment. But treating it as a plea in abatement, the defendant is one of the plaintiffs on the record, and a Company cannot sue one of their own body, unless warranted by the act. *The Bailiffs of Godmanchester* v. *Phillips* (*b*).—(Here he was stopped by the Court).

Lord DENMAN, C. J.—The statute creates both the right and the remedy, therefore the remedy to be pursued is that given by the statute. The authority from Lutwyche shews clearly that a plea like this, which, though perhaps not a plea in abatement in the ordinary sense of the word, yet may in some sense be called so, if it discloses matters in bar of the action, may be taken advantage of as such for the purpose of objecting to the declaration.

PATTESON, WILLIAMS, and WIGHTMAN, Js., concurred.

Judgment for the defendant.

(*a*) This distinction appears to be taken in a *quære* by the reporter, and not by the Court.

(*b*) 5 B. & Ad. 198; S. C. 2 N. & M. 713.

COURT OF EXCHEQUER.

Sittings after Easter Term, 1841.

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May 13*th*.

PICKFORD and Others *v.* THE GRAND JUNCTION RAILWAY COMPANY.

In an action against a Railway Company as common carriers, for refusing to carry and convey goods, the declaration averred, that the "plaintiffs were ready and willing, and then offered to pay the defendants such sum of money as they were legally entitled to receive, for the receipt and carriage and conveyance of the said goods, and all other charges whatsoever, to wit, the sum of £2:"—*Held*, sufficient on special demurrer, and that it was not necessary to make, or to aver a strict legal tender.

CASE. The declaration stated that whereas the defendants before and at the time &c. were common carriers of goods and chattels for hire, to wit, from Birmingham &c. to Manchester &c., and thereupon heretofore, to wit, on &c., the plaintiffs caused to be tendered to the defendants, they being such common carriers to wit, at a certain place in Birmingham, being the place by them then used in the way of their said business as common carriers for the receipt of parcels of goods, to be by them carried and conveyed as such common carriers, a certain parcel of goods of the plaintiffs, to wit, a hamper containing divers goods which then exceeded 500 lbs. in weight, and was then of a certain weight, to wit, 9 cwt. and was then of great value, to wit, of the value of £100, and then required the defendants to receive, and to carry, and convey the same from Birmingham to Manchester; and the defendants then had ample convenience for receiving, and carrying, and conveying the same according to the said requirement of the plaintiffs in that behalf, *and the plaintiffs were then ready and willing, and then offered* (*a*) *to pay to the defendants such sum of money as the defendants were legally entitled to receive for the receipt, and carriage, and conveyance of the said parcel*, and all other charges whatsoever, which the defendants were then authorized, or in any wise entitled to make

(*a*) See the judgment of Lord *Abinger*, C. B., in *Fell* v. *Knight*, 8 M. & W., 269; 10 L. J. N. S. Ex. 38 2.

or receive for the receipt, and carriage, and conveyance of the said parcel from Birmingham to Manchester, to wit, the sum of £2, and the defendants then had notice of the premises. Yet the defendants not regarding their duty as such common carriers, but contriving &c. to injure the plaintiffs, though they did then receive and carry and convey the goods of divers other persons on that occasion from Birmingham to Manchester, did not nor would at the said time when they were so required as aforesaid, or at any time afterwards, receive the said parcel nor carry nor convey the same from Birmingham to Manchester, but wholly neglected and refused so to do, though they might, and could, and ought to, as such carriers, have received, and carried, and conveyed the same, as aforesaid, whereby the plaintiffs were then forced and obliged to carry and convey the said parcel from Birmingham to Manchester, with great labour, cost, and inconvenience, and were put to great expense of their monies, to wit, the expense of £50, to wit, in and about the carriage and conveyance of the said parcel from Birmingham to Manchester, and were and are otherwise greatly annoyed, injured, inconvenienced, and damaged.

Special demurrer, assigning for causes that the said declaration does not shew, or shew with sufficient or proper certainty, that the plaintiffs tendered or offered to tender or would have tendered any sum of money to the defendants for or in respect of the carriage of the said goods, and does not shew any dispensation with, or waiver of any such tender or offer to tender, &c. Joinder in demurrer.

Cowling, in support of the demurrer (*a*).—The objection is, that the declaration does not shew a sufficient tender. The plaintiff should have averred a tender of a specific

(*a*) May 11th, before *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

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sum, or shewn some dispensation or excuse for not doing so; here there is no tender, only an offer at most. As a general rule, tradesmen are not bound to deal with any one; but carriers and innkeepers are compellable, as public servants, to deal; not however to deal on trust, therefore a party trafficking with them ought either to pay or do all in his power to pay. [*Parke*, B.—Is it necessary for a person who puts his goods into the hands of a common carrier to tender the price as a condition precedent to the carrier's performance of his contract? By it he is to convey the goods safely to their journey's end, and if they are stolen or destroyed on the road, he could not recover for the carriage.] In *Pinchon's case* (*a*) it is said,—"If a victualler or common hostler bringeth an action of debt for the victuals delivered to his guest, the guest may wage his law; for a victualler or hostler is not compellable to deliver victuals till he be paid for them in hand. And therewith agrees 10 Hen. 7, 8 a." (citing also 39 Hen. 6, 19, a): And see 1 Hawkins' P. C., c. 32, p. 714, and the law collected in 1 Wms. Saund. 312, n. (2), where it is said,—"No action will lie for a nonfeazance, &c. except in certain cases where, from their situations, some persons are bound to do what is required of them in the course of their employments, and are in return entitled to a recompense; as where a common carrier, having convenience, refuses to carry goods, being tendered satisfaction for the carriage." In *Jackson* v. *Rogers* (*b*), there cited, which was an action on the case against a common carrier, for refusing to carry a pack, though offered his hire, *Jeffries*, C. J., said,—"The action is maintainable as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same." See also Jones on Bailments, (by Theobald), Appendix 5; and Story on Bailments, 328. Therefore,

(*a*) 9 Rep. 87 (*i*). (*b*) 2 Show. 327.

where a person chooses to make an exception to the common law, in order to make a man deal with him, he ought to do all that in him lies towards payment, by at least tendering the price. [*Parke*, B.—How is he to know what the amount is? it is not in the knowledge of both parties.] He might tender what is reasonable. A carrier has no greater lien than any other tradesman; that is not a general but a particular one: *Rushforth* v. *Hadfield* (*a*). The value of the goods may be inadequate, or the person who brings them insolvent. A ferryman can be compelled to carry over a passenger only on payment of his fare. [*Parke*, B.—There is a difference between men and goods, and between a lien at common law and by usage].

Martin contrà.—In this case tendering money would have been an empty ceremony, as the plaintiffs were utterly ignorant what the price was. The authorities cited do not establish the position contended for. In the case in Shower the money was *offered*, not *tendered*, and in Story the word is also *offered*, as also in Bacon's Abridgment, Carriers, (B). The words are used in Williams and Hawkins indifferently, not in the strict legal sense of a tender, but as a common statement of being ready and willing and offering to pay. It is extraordinary that there is no precedent of a declaration against a carrier for refusing to convey goods, but there is one against an innkeeper for refusing to entertain a guest (*b*), and there the word used is *offered* to pay a reasonable sum of money. [*Alderson*, B.—It means, I am ready to deal with you for ready money, and offer to do so.] A tender only applies to a debt. *Rawson* v. *Johnson* (*c*) is the leading case as to the way of pleading such things. There, an averment of an actual tender of price was held unnecessary; it was enough

(*a*) 7 East, 224.
(*b*) 2 Chitty on Pleading, 6th edit., 468.
(*c*) 1 East, 203.

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for the plaintiffs to aver a request, and that they were ready and willing to receive and pay for the malt. And Lord *Kenyon*, C. J., said,—"To be sure, under this averment, the plaintiffs must have proved that they were prepared to tender and pay the money, if the defendant had been ready to have received it and to have delivered the goods; but it cannot be necessary, in order to entitle them to maintain their action, that they should have gone through the useless ceremony of laying the money down in order to take it up again. It would be repugnant to common sense to require it." And in the same case *Grove*, J., referring to *Morton* v. *Lamb* (*a*), says, —"I have before me the ground of objection that was made in arrest of judgment in that case, namely, that the plaintiff had not averred that he had tendered to the defendant the price of the corn, *or was ready to have paid for it on delivery*." [*Parke*, B.—They are what are called contemporaneous acts. A tender is a payment of an antecedent debt, as much as a man can pay it; then if the other refuses, it is as good as payment, but he must always be ready and bring it into Court.] It is consistent with reason and good sense that, when concurrent acts are to be done, it is enough for one to say he is ready. Other cases establish the same principle. In *Wilks* v. *Atkinson* (*b*), *Gibbs*, C. J., said,—"The delivery of the oil and the payment for it were to be concomitant acts, and it was not necessary for the plaintiff to prove that he had offered the money to the defendant till the defendant was ready to perform his part of the contract by delivering the oil." So in *Levy* v. *Lord Herbert* (*c*), and *Waterhouse* v. *Skinner* (*d*). It is impossible, therefore, to draw a distinction between a duty created by law and contracts of this nature. Besides it is a question whether a carrier is entitled to pay-

(*a*) 7 T. R. 125.
(*b*) 1 Marsh. 412; 6 Taunt. 11.
(*c*) 1 Moore, 56; 7 Taunt. 314.
(*d*) 2 Bos. & Pul. 447.

ment before completing his work; his duty is to receive the goods and rely on his lien for payment.

Cowling in reply.—This act, 3 Will. 4, c. xxxiv, allows only two charges; 1st, tolls, and, 2nd (by section 149), a sum for carriage. It is said a tender would be an empty ceremony where the price is not known, but that does not apply here, for the declaration avers a tender of £2, which shews they knew the price. [*Parke*, B., That is under a *videlicet*.] If not, *non constat* that the Company have not determined the price, which they ought to shew, so as either to tender or excuse a tender. There is no authority for the precedent in Chitty, and the others are all cases of concurrent things to be done at a future time, as the conveyance of an estate and payment of the purchase-money. Here there is no prior contract; the liability of the carrier does not arise till the plaintiffs perform their condition precedent of tendering the price. A carrier cannot ascertain the value of the goods, and his lien is gone when his duty is done, which is when they are delivered.

Cur. adv. vult.

PARKE, B., now delivered the judgment of the Court.—This was an action against the Grand Junction Railway Company for refusing to carry certain goods. The declaration alleges, that the defendants were common carriers for hire. (His Lordship read the declaration). To this there was a demurrer, on the ground that there was no averment of a tender of any money for the carriage of the goods. It was admitted on both sides in the argument on this case, that the defendants, in their capacity of common carriers, are bound to carry all goods presented to them for the purpose, but that, it is contended by the defendants, is only on being paid in ready money the amount they are entitled to charge for the carriage; and the simple question

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is, whether, in order to support an action against them for refusing to carry, on a tender of a reasonable sum, it is necessary that the plaintiffs should have made what the law terms a strict tender, in the form required by law. Now the Court thinks that this is not like the case of a strictly legal tender, a term which is only applicable where an absolute duty, such as the payment of an antecedent debt, is imposed on the party making it; in which case the tender stands in the place of payment, so far as it is in the power of the party tendering to make it one, and which remains incomplete only because the party to whom the money is offered refuses to receive it. Such a tender we consider to be altogether unnecessary in the present case; the acts to be done by both parties, namely, the receipt of the goods by the carrier, and a payment of a reasonable sum for their carriage by the plaintiffs, being contemporaneous acts, the carrier being bound to receive the goods on the money being paid or tendered, and the latter to pay the reasonable amount demanded on the taking charge of the goods. The case of *Rawson* v. *Johnson* (*a*), and the other cases cited by Mr. *Martin*, clearly shew, that whenever a duty is cast on a party in consideration of a contemporaneous act to be done by another, it is sufficient if one party is ready to pay the money when the other is ready to undertake the duty. So here the acts to be done by the plaintiffs and defendants are altogether contemporaneous, the money is not required to be paid down by the former until the carrier receives the goods, which he is bound to receive and carry, on payment of the proper sum for the carriage. Our judgment, therefore, must be for the plaintiffs; but as there are some other questions pending between these parties which they are desirous of having decided in the present action, the defendants may have until the first day of next Term to apply to a Judge at Chambers for leave to amend on payment of costs.

(*a*) 1 East, 203.

ALDERSON, B.—In cases of this nature, it is enough if the party be ready and willing to deal for ready money, and notify that readiness and willingness to the other side.

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Judgment for the plaintiffs (*a*).

(*a*) See *Riley* v. *Horne*, 5 Bing. 224; and *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L. J. N. S. Ex. 382.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1841.

THE QUEEN *v.* THE BRISTOL DOCK COMPANY.

May 25th.

MANDAMUS to the Company to repair the bank of their canal (*b*). The writ recited part of the 30th section of 43 Geo. 3, c. 140, (local and personal, public), entitled, "An Act for improving and rendering more commodious the Port and Harbour of Bristol," whereby the Company were (*inter alia*) commanded "*to make, complete, and maintain* a new course or channel for the river Avon, from &c., through &c.; the same to be of equal depth and breadth

An act of Parliament, (43 Geo. 3, c. 140,) authorized a Dock Company to make, complete, and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and of equal inclination at the sides with the old course or channel (taken by them for the purposes of their navigation).

Held, that a duty was thereby cast upon the Company generally to repair the banks of the new channel.

And that *mandamus* would lie to compel them to repair, though they might also be liable to indictment.

A *mandamus* having issued to compel the Company to repair and maintain the banks, they returned that they were not required by the said statute, nor were otherwise liable to repair the banks; and that, as near as circumstances permitted, they had maintained the said new course or channel of equal depth and breadth at the bottom, and of equal inclination of the sides with the old course or channel:—*Held*, an insufficient return.

(*b*) See *The Queen* v. *The Bristol Dock Company*, antè, Vol. 1, p. 571, where the sections of the act are set out at length.

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at the bottom, and with equal inclination of the sides, as the present river course then had in those parts thereof which had not been excavated or embanked by quay walls or other buildings, or as near as circumstances would admit, and except only in such part of the said new course as should be cut through rock or stone, and also to make, complete, and maintain such other works and improvements within the limits after mentioned, as the Company should consider necessary for, and which would completely answer and effect the purposes aforesaid." The writ then recited that the Company had, in pursuance of the above powers, made the new channel in question, and proceeded thus—"We have been given to understand that, since the making and completing of the said new course or channel of the river Avon, certain parts of the south bank or side of the new course or channel, not cut through rock or stone, lying between Harford's Bridge and Hill's Bridge, in the city and county of Bristol, have become and now are broken down and out of repair, and the inclination of the sides of the said parts of the south bank or side of the new course of the channel has been thereby greatly altered since the construction thereof, to the great danger of the obstruction of the navigation of the said river, and to the great damage and prejudice of all our liege subjects having occasion to use and navigate the same." The mandatory part of the writ required the Company to repair the said parts of the south bank of the new course or channel of the river Avon, lying between Harford's Bridge and Hill's Bridge, or that they should shew cause &c.

The return was as follows:—1. That the Company are not required by the said statute in the writ mentioned, nor are they otherwise liable to repair and maintain the said parts of the south bank of the new course of the river Avon, in the writ mentioned. 2. That, as near as circumstances have admitted or do admit, they have maintained the said new course of equal depth and breadth at the bottom, and

with equal inclination of the sides, as the then present river, at the time of the said act (43 Geo. 3, c. 140) had in those parts thereof, which had not then been excavated or embanked by quay walls or other buildings, and except only in such parts of the said new course as have not been cut through rock or stone. Wherefore, for the reasons above returned, the Bristol Dock Company cannot and ought not to repair or maintain the said part of the said south bank, as by the said writ they are commanded.

The case came on for argument after a *concilium*.

The prosecutor's points were, that the Company were liable to repair and maintain the bank. That the writ commanded the Company to repair and maintain the south bank of the new course, and that it was no answer to say that the Company, as near as circumstances had admitted or did admit, had maintained the said new course of equal depth and breadth at the bottom, and with equal inclination of the sides as the old river course had. That by the act the Company were bound to repair the new course and the banks thereof absolutely.

The points for the Company were, that the return was good. That *mandamus* would not lie in such a case. That, if *mandamus* were the correct mode of proceeding, the writ did not disclose any liability on the part of the Company to repair the bank as required. That it was consistent with the writ that the inclination of the bank they were ordered to repair was the very *same* inclination which was required by the statute.

Sir *J. Campbell*, Attorney-General (Sir *W. Follett* and *Butt* with him), against the return (*a*). In this case the proper remedy is by *mandamus*, and it is no answer to say that there is a remedy by indictment: *Rex* v. *The Severn and Wye Railway Company* (*b*). In the case of *Rex* v. *The*

(*a*) January 20th, 1841, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

(*b*) 2 B. & A. 646.

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Bristol Dock Company (*a*), where a public nuisance was created in consequence of the sewers not being maintained as they ought to have been, a peremptory *mandamus* issued to this Company.

With respect to the liability to repair the banks, that is involved in the terms of the act of Parliament, which says in express language they shall "maintain" the new course. But without such language of the statute, the cases shew that such a duty would be cast upon them at common law. *Rex* v. *The Inhabitants of Kent* (*b*), *Rex* v. *The Inhabitants of the Parts of Lindsey* (*c*), and *Rex* v. *Kerrison* (*d*). [*Coleridge*, J.—Is anything said in those cases about the act prescribing the duty?] Only by implication; there is a general obligation to maintain, and something cumulative.

Then it is no answer that the bank and sides have been preserved in the manner directed by the act; that is only part of the duty. The mandatory part of the writ is not to make the channel of equal breadth and depth &c., but to repair and amend the banks of the new course, and the writ would have been good if the words as to altering the inclination had been struck out. The answer is exclusively directed to the depth and breadth at the bottom, and inclination of the sides, which the Company say they have preserved as near as circumstances will permit. There is no qualification or condition to their obligation to maintain, they are authorized and *required* by the act to do so. There is a specification of one thing which they must do, and "as near as circumstances permit," may be a qualification to that, but not to the repairing the banks. If therefore there be any obligation cast upon them, this is no answer to the mandatory part of this writ. They should at least have stated the particular circumstances which

(*a*) 6 B. & C. 181.
(*b*) 13 East, 220.
(*c*) 14 East, 317.
(*d*) 3 M. & S. 526; and *see* *Priestley* v. *Foulds*, antè, p. 422.

make a strict compliance with it impossible. *Rex* v. *The Ouze Bank Commissioners* (*a*).

Sir *F. Pollock* (*Davison* with him) *contrà*.—Two things are blended together in this *mandamus*; the complaint as to the want of repair, and as to the inclination of the bank. The Company deny that the banks are out of repair as to the particular cause for which the writ was granted, though they admit that some repairs are necessary. But a *mandamus* ought not to issue for the ordinary purpose of repair. *Rex* v. *The Inhabitants of Kent* (*b*), *Rex* v. *The Inhabitants of the Parts of Lindsey* (*c*), and *Rex* v. *Kerrison* (*d*), were all cases of duties or obligations arising out of an act; and the proceedings in all were by indictment, which is the proper remedy when there is nothing specific required to be done, as the construction of a sewer, bridge, or other particular work. That was the principle acted upon by this Court in *Regina* v. *The Trustees of the Oxford and Witney Roads* (*e*); and in *Regina* v. *Gamble* (*f*) Lord *Denman*, C. J., says, "I think the danger here would be better met by the other remedy than by *mandamus*; I believe it is generally thought that the decision in *Rex* v. *The Severn and Wye Railway Company* (*g*) went far enough." Here indictment is not only the more convenient, but the proper remedy.

The writ calls upon the Company to do two things: 1, repair generally; and 2, to put the canal in a certain state as to depth, width, and inclination of the sides. The answer to the first is, that they are not liable; to the second, that they have done it as far as circumstances permit; that is, as far as there is any subject-matter of which this Court takes cognizance; not as to general repairs. In

(*a*) 3 A. & E. 544.
(*b*) 13 East, 220.
(*c*) 14 East, 317.
(*d*) 3 M. & S. 526.
(*e*) 4 P. & D. 154.
(*f*) 11 A. & E. 69; S. C. 3 P. & D. 122.
(*g*) 2 B. & A. 646.

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The Lancaster Canal Company v. *Parnaby* (*a*), *Tindal*, C. J., says, "The common law in such a case imposes a duty on the proprietors, not perhaps to repair the canal, or absolutely to free it from obstruction, but to take reasonable care, so long as they keep it open for the public use of all who choose to navigate it, that they may do so without danger to their lives or property;" that is in other words, it may be doubtful whether they are bound to repair, but are amenable for damage to persons or property. The plain and obvious complaint in this writ is of the inclination, not of the want of general repairs. [*Patteson*, J.—The subject of complaint is, that the inclination is altered by reason of the want of repair.] Suppose for the present a liability to maintain the bank, the answer is, if by calling upon them to *maintain*, the complaint is that the water oozes, or of anything else but the alteration of the inclination, the Company is not liable. [*Littledale*, J.—They will contend that the word "repair," must be included in "maintain."] There are several instances in the act where "repair" is used with "maintain;" in sect. 40, it is used distinctly apart from it. The intention of the legislature in this act was to preserve the *course* of the river free; the struggle here, in defiance of the Company saying they have complied with the act, is to obtain a peremptory *mandamus* on the subject of the inclination, so as to deprive them of the right of a trial by the country.

Sir *J. Campbell*, Attorney-General, replied.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—The Bristol Dock Company, to whom this writ of *mandamus* was addressed, are created by a local act of Parliament, (43 Geo. 3, c. 140), to improve the port and

(*a*) Antè, Vol. 1, p. 696.

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harbour of Bristol, by doing certain works, among which are the making, completing, and maintaining a new course or channel for the Avon, from, at, or near the Redcliff, by a certain line into the Avon, at a point described, "the same to be of equal depth and breadth at the bottom, and with equal inclination of the sides, as the then present river course then had in those parts thereof which had not been excavated or embanked by quay walls or buildings, or as near thereto as circumstances would admit, and except only in such parts of the said new course as should be cut through rock or stone."

The 30th clause of the act expressly requires the Company to make, complete, and maintain these works; and the writ, after reciting the enactment, proceeds to allege that the Company did make and complete them, but that, since the making and completing of the said new course or channel of the Avon, certain parts of its south bank or side, not cut through rock or stone, have become and now are broken down and out of repair, and the inclination of the said side of the said parts of the new course or channel has been thereby greatly altered since the construction thereof, to the injury of the navigation. It then enjoins defendants to repair and maintain the said parts of the said south bank.

The return of the Company is, that they are not bound to repair and maintain the said parts of the said south bank of the said new course or channel; and that, as near as circumstances have admitted or do admit, they have maintained the said new course or channel of equal depth and breadth at the bottom, and with equal inclination of the sides, as the river, in the 43 Geo. 3, had in those parts, which had not then been excavated or embanked by quay walls or other buildings, and except only in those parts thereof which had been cut through rock or stone.

On the argument, objection was taken to the writ, be-

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cause it only enjoined the doing that for omitting which the Company are liable to indictment. But we think, even if such an objection did not come too late, after the writ was issued, that it is entitled to no weight. Those who obtain an act of Parliament for executing great public works, are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court by *mandamus* so to do. If their breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them.

Then the return is insufficient, merely denying the liability to repair the south bank. This is traversing matter of law, and the law is clearly against them, for the south bank of the new channel plainly appears to be a part of the works done under the act, which the Company are bound to repair. The added statement, that, "as near as circumstances would admit, they have kept the inclination equal," (which might possibly have been an answer if the mandatory part of the writ had merely required such inclination to be preserved), is certainly no answer to the writ as it is framed; for the want of such equality of inclination is merely stated as a consequence of their omission to repair and maintain. That being so, we think a peremptory *mandamus* must be awarded.

Peremptory *mandamus* awarded.

COURT OF EXCHEQUER.

In Hilary Term, 1841.

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May 28th.

MUSCHAMP *v.* THE LANCASTER AND PRESTON JUNCTION RAILWAY COMPANY.

CASE.—The declaration stated, that after the passing of a certain act (7 Will. 4, c. xxii), intituled &c., the defendants were the proprietors of a certain railway, to wit, &c., and of certain engines and carriages used thereon, and that the plaintiff on &c. caused to be offered and delivered to the defendants, to wit, as common carriers, and the defendants received as such carriers a certain box and divers goods and chattels contained therein of the plaintiff, to be safely and securely carried and conveyed for the plaintiff by the defendant, from Lancaster aforesaid, upon the said railway and upon other railways, and to be caused by the defendants to be left at a certain other place, to wit, at a certain place called the Wheatsheaf, Bartlow near Bakewell, Derbyshire, for the plaintiff for certain reward, to be therefore paid by the plaintiff to the defendants, yet the defendants contriving &c., did not nor would convey the said box &c. upon their said railway or upon other railways, or cause the same to be left at the said Wheatsheaf &c. for the plaintiff; but through the negligence, carelessness, &c. of the defendants, the said box, goods, and chattels were wholly lost to the plaintiff.

Pleas—1st. Not guilty; 2nd. That the plaintiff did not cause to be delivered to the defendants, nor did the de-

The Lancaster and Preston Junction Railway unites at Preston with the North Union Railway, and that line afterwards with another, and so on into Derbyshire. A parcel directed to a person in Derbyshire was delivered at Lancaster to the Lancaster and Preston Railway Company, who were known only to be proprietors of the line of railway as far as Preston; on the person bringing the parcel offering to pay the carriage, the book-keeper said it had better be paid by the person to whom it was directed on the receipt of it. The parcel arrived safe at Preston, was forwarded from thence by the North Union Railway, and afterwards lost:—*Held*, that the Lancaster and Preston Railway Company were liable for the loss of it.

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fendants accept and receive the said box &c. for the purpose and in the manner and form as the plaintiff hath in his said declaration alleged—on which issues were joined.

At the trial before *Rolfe*, B., at the Liverpool Spring Assizes, 1840, it appeared that the defendants are the proprietors of the Lancaster and Preston Junction Railway, which at Preston joins the North Union Railway, which joins the Liverpool and Manchester Railway at Parkside, that terminating in the Grand Junction Railway. The plaintiff had left Lancaster for Derbyshire, leaving a box of tools to be sent after him. This box was taken to the station at Lancaster by his mother, who desired the clerk to book it. It was directed to the plaintiff, "To be left at the Wheatsheaf, Bartlow near Bakewell, Derbyshire," (Bartlow being about eight miles from the Birmingham and Derby Junction Railway). The clerk stated, in answer to an offer to pay the carriage, that it had better be paid on the receipt of it by the person who it was stated would be ready to receive it. It was proved that the box arrived safely at Preston, and was from thence forwarded by the North Union Railway, and lost.

His Lordship directed the jury, that where a common carrier takes charge of a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, that is *primâ facie* evidence of an undertaking to carry it to the place to which it is directed, even although that place might be beyond the limits of his trade as a carrier. The jury returned a verdict for the plaintiff for the value of the box and its contents; and *Cresswell*, in the *Easter* Term following, having obtained a rule *nisi* for a new trial on the ground of misdirection—

Martin now shewed cause (*a*), and contended that there

(*a*) Before Lord *Abinger*, C. B., *Gurney*, and *Rolfe*, Bs.

was evidence of an undertaking by the defendants to carry the box to its ultimate destination, and that the sum for carriage, if paid in advance as offered, would have been for the whole distance. (He was stopped by the Court.)

Cresswell, Baines, and *Burrell, contrà.*—The principle on which parties must be taken to contract in such cases, is in reference to the known mode in which the carrier conducts his business. This is not like the case of a stage-coach professing to carry through the whole of a line of road, for this Company do not profess to carry any further than Preston, and are no more liable for the safety of a parcel beyond that place, than a carrier for one stage out of London for the safe delivery of a parcel directed to the end of the kingdom, or the owner of a steam-boat between England and Ireland for a box directed to an inland town in the latter. If so, the same principle would apply to a passenger injured, as to goods lost by negligence on this part of the journey. The defendants engage to carry, as far as they hold out to the public and are empowered by their act to trade as carriers, and after that to transfer the goods to another carrier, and so onward, thereby giving the owner a remedy against the new bailee. *Garside* v. *The Proprietors of the Trent and Mersey Navigation* (*a*), *Upston* v. *Slark* (*b*), and *Gilbart* v. *Dale* (*c*), where in an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach &c., charging negligence, whereby the consignor lost his goods, it was held not sufficient to prove that they never reached their destination, but that some evidence must be given shewing a breach of duty.

LORD ABINGER, C. B.—The simple question here is, whether the learned Judge misdirected the jury in telling

(*a*) 4 T. R. 581. (*b*) 2 C. & P. 598.
(*c*) 5 A. & E. 543; 1 N. & P. 22.

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them that if the case were stripped of all other circumstances than the knowledge by the plaintiff that the defendants were carriers only from Lancaster to Preston, and the fact that they accepted the parcel to be carried to a more distant place, they were liable for the loss of it; this being evidence from which the jury might infer that they undertook to carry it safely to that place. I think in this there was no misdirection. It is admitted that the defendants contract to do something more than carry the parcel to Preston, namely, to deliver it there to an agent who is to carry it on, and then to be replaced by another, and so on to the end of the journey. That is a very elaborate kind of contract; in substance, it gives a general power to the carriers along the whole line to make at pleasure fresh contracts, which shall be binding on the principal. But if something more was meant to be done by the defendants than carrying to Preston, surely it is for the jury to say what the contract is, and how much more was agreed to be done. It might be true that the contract was such as is suggested on the part of the defendants, but there are other views equally probable, as for instance that these Companies, though separate, are in the habit, for their own advantage, of making contracts to convey goods along the whole line to the ultimate terminus, each being the agent of the other to forward the goods, and each receiving their share of the profits from the last. The fact that, according to the agreement, the carriage was to be paid at the end of the journey confirms the notion, that the parties who were to carry the parcel from Preston to its final destination were under the control of the defendants, who consequently exercised some influence beyond the terminus of their own railway. Is it not then a question for the jury to say what was the nature of the contract, and the inference, that the whole was one contract, as reasonable for them to draw as the contrary? I hardly think they would be likely to infer so elaborate a contract as the one sug-

gested on the part of the defendants, that as the line of their railway ends at Preston, it is to be presumed that the plaintiff, when he intrusted his goods to them, made it a part of the bargain that they should employ a fresh agent for him there, and at every subsequent change of railway or conveyance, and on each shifting of the goods, give such a document to the new agent as should render him responsible. Suppose the owner, under such circumstances, when he finds the goods have not come to hand, goes to the railway office and complains, then, if the defendants' argument be well founded, unless the Company refuse to supply him with the name of the new agent, they break their contract. It is true, that practically it might make no great difference to the owner of the goods which was the real contract, if their not furnishing the name immediately would entitle him to an action against the Company. But the question is, why should the jury infer one contract rather than the other, which of the two is the more natural, usual, and probable? Then, the money for carriage being one undivided sum supports the inference that although this Company carry only a certain distance with their own vehicles, they make subordinate contracts with other carriers, and are partners, *inter se*, in the carriage money, a fact of which the owner of the goods could know nothing, as he only pays the entire sum at the end of the journey which they afterwards divide as they please. There is, therefore, not only some evidence of the contract being of this nature, but it is the most likely one under the circumstances, for it is admitted that the defendants undertook to do more than simply to carry the goods to Preston. The whole matter was a question for the jury to determine the nature of the contract from the evidence before them.

As to the case referred to of the booking-office in London, it only shews that, when persons take charge of parcels at such an office, they merely make themselves agents to book for the stage-coaches. You go to the office and book a parcel,

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the effect of that is to make the booker your agent, instead of going yourself to the coach-office; and if he sends the parcel to the proper office and delivers it there, he discharges himself; he has nothing to do with the carriage of the goods. In cases like the present, particular circumstances might no doubt be adduced to rebut the inference which *primâ facie* must be drawn of the defendants having undertaken to carry the goods the whole way. The taking charge of the parcel is not put as conclusive evidence of the contract sued on by the plaintiff, it is only *primâ facie* evidence of it; and it is useful and reasonable for the public benefit that it should be so considered. It is better that those who undertake the carriage of parcels for their mutual benefit, should arrange matters of this kind *inter se*, and should be taken each to make the other his agent to carry forward the goods.

GURNEY, B.—I think that in this case there was no misdirection, and that the jury might infer the contract to have been such as was stated by the learned Judge. If the goods were to be carried only in the narrow sense contended for by the defendants, then if their destination were only three miles beyond Preston, and they were lost on the other side of the railway terminus, the defendants would not be liable, but the plaintiff must find somebody who is to be liable for the carriage for these three miles.

ROLFE, B.—I am of the same opinion. I think this construction of the agreement is not only consistent with law, but is the only one consistent with common sense and the convenience of mankind. What I told the jury was this, that if a party brings a parcel to a railway station, which is in this respect the same as a coach-office, knowing at the time that the Company only carry to a particular place, and they receive it and book it to the place to which it is directed, *primâ facie* they undertake to carry it to that

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place. That was the view I entertained at the trial, and nothing has occurred since to alter my opinion. As to the case suggested of a passenger injured on the line of railway beyond that on which he was originally booked, I suppose it is put as a *reductio ad absurdum*; but I do not see the absurdity. If I book my place at Euston Square and pay to be carried to York, and am injured by the negligence of somebody between Euston Square and York, I do not see why I am not to have my remedy against the party who contracted to carry me to York. At all events, in the case of a parcel, any other construction would open the door to incalculable inconvenience. You book a parcel, and, on its being lost, are told that the carrier is responsible only for a portion of the line of road. What would be the answer of the owner? "I booked the parcel at the Golden Cross for Liverpool, and my contract with the carrier was that he should take it to Liverpool." All convenience is one way, and there is no authority for the other.

Rule discharged.

COURT OF EXCHEQUER.

In Trinity Term, 1841.

THE QUEEN *v.* WEST, (one of the Proprietors of the Hull and Selby Railway).

May 29.

The Court quashed a coroner's inquisition, which described the engine and carriage moving to the death, as the goods and chattels, and in possession of "The Proprietors of the Hull and Selby Railway," that not being their name of incorporation.

IN *Michaelmas* Term, 1840, Sir *W. W. Follett* had obtained a rule to shew cause, why, upon reading the inquisition taken before Matthew Pearson, one of the coroners

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of the county of York, on *view of three bodies* then and there lying dead, the said inquisition should not be quashed. The jurors found that "the said three persons, N. P., T.S., and E. L., on the 7th of August, 1840, at &c., were in the act of travelling in certain carriages attached to and drawn forward by a certain steam-engine, called the Collingwood, upon the line of the Hull and Selby Railway there being; and that the said steam-engine, called the Collingwood, and the said railway-carriages were moving to the respective deaths of the said N. P., T. S., and E. L., and are the goods and chattels, and in the possession of the proprietors of the Hull and Selby Railway, and of the proprietors of the Leeds and Selby Railway."

Several objections were taken to the inquisition, one of which was, that an inquisition should not sit on more than one body; but the judgment of the Court turned only upon the objection that the ownership of the property was badly described, neither the names of the proprietors nor their proper name of incorporation being stated.

Sir *J. Campbell*, Attorney-General, (Sir *F. Pollock* and *Waddington* with him), shewed cause (*a*).—This rule is drawn up upon reading the inquisition, therefore no objection can be entertained that does not appear upon the face of it. It would be enough to describe a partnership firm, or a corporation in this manner, and there is no reason why it should not be assumed for this purpose that there are two corporations, with these titles, and if so, the two corporations may be jointly in possession of these things.

Sir *W. W. Follett* (*Baines* and *Hildyard* with him), contrà. —This is not a proper description in a legal instrument of owners of property. To make it so, it must be assumed

(*a*) Before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

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that they are corporations, which cannot be assumed. Such a description in the case of partners was held bad in *Rex* v. *Harrison and Company* (*a*), which was a conviction on the excise laws against persons so described. Lord *Kenyon*, C. J., said—"It is impossible that a conviction of such an one *and Company* can be supported. It is a mere nullity, even against the party named." [Lord *Denman*, C. J.—There is no reference to acts of Parliament to shew they are corporations.] There are no acts creating such corporations by these names (*b*), and the Court cannot assume that they are created by charter; it ought to be expressly stated. (Here he was stopped by the Court.)

Lord DENMAN, C. J.—The ownership is a material part of the description of the thing moving to the death, that it is the *property* of such and such persons. In the absence of authority, I think this description will not do; it might as well have said, "the proprietors of a tavern." The owners must be correctly described, as the county has to levy on them for the deodand.

Inquisition quashed.

(*a*) 8 T. R. 508.

(*b*) The statute 6 Will. 4, c. lxxx, s. 1, enacts, "that the persons therein mentioned shall be one body corporate, by the name and style of '*The Hull and Selby Railway Company*.'"

1841.

COURT OF EXCHEQUER.

In Trinity Term, 1841.

June 1st.

STEWART *v.* CAUTY.

In an action for not accepting railway shares sold at Liverpool to be delivered in a reasonable time, a rule of the Liverpool Stock Exchange acted upon by all the Liverpool brokers, and seen by the defendant, "that the seller of shares is, in all cases, entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he is made acquainted with the name of his transferee," was held admissible as evidence of the reasonableness of the time for completing the contract, on an issue as to the plaintiff's being ready and willing to do so.

Where shares are not accepted, and are resold within a reasonable time by the vendor, the measure of damages is the difference between their price at the time of the contract, and at the time of the resale.

ASSUMPSIT for breach of contract in not accepting shares in the Great Western Railway. The declaration stated that whereas on the 10th of August, 1840, the defendant bargained for and agreed to buy of and from plaintiff who, at the request of the defendant, then agreed to sell to the defendant twenty half shares in the Great Western Railway Company at £52 per half share, to be transferred, delivered, and paid for within a reasonable time afterwards; and thereupon, to wit, on the day and year last aforesaid, in consideration of the premises, and that the plaintiff, at the request of the defendant, had then promised the defendant to perform the same when he should be thereunto afterwards requested, the plaintiff afterwards, to wit, on the day and year last aforesaid, was ready and willing and offered to deliver the said shares to the defendant, but the defendant discharged him from tendering or transferring the same, and refused to accept them, &c. Plea. That *within a reasonable time, to wit, on the 30th of August*, 1840, *he the defendant was ready and willing and offered to accept, and pay for, and requested the plaintiff to deliver the said shares*, but that plaintiff would not then, or at any time within a reasonable time, deliver them, whereupon the defendant rescinded the contract, and refused to accept the shares. Replication. That *within a reasonable time after the making of the mutual promises, to wit, on the 26th of August*, 1840, *plaintiff was ready and willing and offered to deliver and requested the defendant to accept the shares*, and that defendant refused to accept the same, and discharged the plaintiff from tendering them; *absque hoc*, that the defendant, *at or after the time when the plaintiff was ready and willing and offered to deliver, and requested the defendant to accept the shares*, or at or after the time when the defendant discharged the plaintiff from tendering the same, *was ready and willing, or offered to accept, or pay for, or requested the plaintiff to deliver the said shares.* Issue.

Held, that on these pleadings it was incumbent on the defendant to shew that he was ready and willing to pay for the shares during the whole of the time stated as a reasonable time for delivery, and that after verdict it was to be presumed that the jury found the plaintiff was ready during such reasonable time to deliver the shares.

fendant to deliver and transfer the said half shares within a reasonable time afterwards, the defendant promised the plaintiff to accept and receive such half shares and the transfer thereof within such reasonable time, and within a reasonable time afterwards to pay him for such half shares at the rate aforesaid. And the plaintiff in fact says, that *within a reasonable time* after the making of the said mutual promises, to wit, on the day and year last aforesaid, *he, the plaintiff, was then ready and willing, and then offered to deliver* and transfer the said half shares to the defendant, and then requested the defendant to accept and receive the same and the transfer thereof. Yet the defendant then wholly refused to accept or receive the said half shares, or any of them, or any transfer thereof, or of any of them, and then discharged the plaintiff from tendering to him the same half shares or any of them, or any transfer thereof, or of any of them: and although a reasonable time for accepting and receiving the said half shares, and the transfer thereof, and also a reasonable time afterwards for paying for the said half shares at the rate aforesaid, had elapsed long before the commencement of this suit, yet the defendant has hitherto wholly refused and neglected to accept or receive the said half shares, or any of them, or any transfer thereof, or of any of them, or to pay the plaintiff for the same half shares, or any of them, at the rate aforesaid, or otherwise howsoever. (Count for money paid and on the account stated).

Pleas, 1st, *non assumpsit.* 2nd, As to 1st count of the declaration, that the plaintiff was not within such reasonable time ready and willing, nor did he offer to deliver and transfer the said half shares to the defendant, or request him to accept and receive the same, and the transfer thereof, *modo et formâ.* 3rd, That the defendant did not discharge the plaintiff from tendering to him the said half shares, or a transfer thereof, *modo et formâ.* 4th, That *within a reasonable time* after the making of the said

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promises, and before the commencement of this suit, to wit, on the 30th of August, 1840, *he the defendant was ready and willing to accept and receive and pay for, and offered the plaintiff* to accept and receive from him, and to pay him for, and requested the plaintiff to transfer and deliver to him the defendant the said half shares; of all which premises &c. the plaintiff, to wit, then had notice. Yet the plaintiff did not nor would, then or at any time within a reasonable time in that behalf, deliver or transfer to him, the defendant, the said half shares, or any of them, but therein wholly failed and made default; whereupon the defendant did, to wit, then wholly rescind, cancel, repudiate, and put an end to the said contract &c.; whereof the plaintiff, to wit, then had notice: whereupon the defendant did afterwards refuse to accept or receive the said shares &c. at the time therein in that behalf mentioned, as he well might for the cause aforesaid.—Verification. 5th, That after the making of the promises, &c., and before any breach thereof by the defendant or the plaintiff, it was agreed by them that the said contract should be put an end to, and that they should be exonerated and discharged from the performance of their promises, &c. Issue joined on the three first and 5th pleas.

Replication to 4th plea. That *within a reasonable time* after the making of the mutual promises &c., to wit, on the 26th of August, 1840, *he the plaintiff was ready and willing and then offered to deliver* and transfer the said half shares to the defendant, and then requested the defendant to accept and receive the same and the transfer thereof; *and* that the defendant then refused to accept or receive the same, or any of them, or any transfer thereof, and then discharged the plaintiff from tendering to him the said half shares, or any of them, or any transfer thereof, or of any of them; *without this*, that the defendant, *at or after the time* when (as in the said 1st count in that behalf mentioned) the plaintiff was ready and willing and offered to

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deliver the said half shares to the defendant, and then requested him to accept and receive the same and the transfer thereof, or at or after the time when (as in the said 1st count in that behalf mentioned) the defendant discharged the plaintiff from tendering to him the same half shares or any of them, or any transfer thereof or of any of them, was ready or willing to accept, or receive, or pay for, or offered the plaintiff to accept or receive from him or pay him for, or requested the plaintiff to transfer and deliver to him the defendant the same half shares, *modo et formâ.* —Issue.

At the trial before *Rolfe*, B., at the Liverpool Spring Assizes, 1841, it appeared that the contract in question had been made at Liverpool between the brokers of the plaintiff and defendant on the 26th August 1840, on which occasion, however, the names of the principals were not mentioned, and that of the defendant, the purchaser, was not disclosed until the 31st. The defendant then requested the plaintiff, the seller, to transfer the shares; and on his neglecting to do so, on the 5th of September following gave him notice that he would not wait after the following Monday (the 7th) for the transfer, but would repudiate the contract altogether. On the 7th he received notice that the plaintiff would transfer the shares, but he then refused to accept them. The shares were sold in the market on the 15th at £161 less than the price contracted for, and this action was brought to recover that sum.

In order to prove the averment in the declaration, that the plaintiff was ready and willing, and offered to transfer the shares within a reasonable time, he tendered in evidence a copy of the rules of the Stock Exchange at Liverpool, which were stated to be acted on by all the brokers there. One of these was, that the seller of shares was in all cases entitled to seven days after the day on which the name of the transferee was given in, to complete the contract by delivery. This rule was shewn to the defendant

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at the time of the bargain, but it did not appear that either he, the plaintiff, or the brokers were members of the Liverpool Stock Exchange. This evidence was objected to on the part of the defendant, but received by the learned Judge, who, in summing up, directed the jury, that the seller under such circumstances was bound to re-sell the shares within a reasonable time after the repudiation of the contract, and thereupon was entitled to recover as damages the difference between the price at the time of the contract, and that at the time of the re-sale. The jury found a verdict for the plaintiff for the whole amount.

Crompton (*a*) now moved for a new trial, on the ground that this evidence had been improperly received; that the usage of the Liverpool Stock Exchange, of which neither party was a member, was not admissible, as they could only be bound by the general practice of the trade, and not of particular individuals. Secondly, that the damages ought to be calculated by the difference between the price at the time of making the contract and its repudiation, not the time of re-sale. *Boorman* v. *Nash* (*b*). He also moved to arrest the judgment, or to enter judgment for the defendant notwithstanding the verdict, or for judgment of repleader (*c*).

ALDERSON, B.—You may take a rule on the point made in arrest of judgment, &c., but with respect to the rest of the case, I think the learned Judge was right, and that those rules which were acted upon by all the brokers of Liverpool, and had been shewn to the defendant, were

(*a*) April 17th. Before *Alderson*, *Gurney*, and *Rolfe*, Bs.

(*b*) 9 B. & C. 145.

(*c*) See *Phillpotts* v. *Evans*, 5 M. & W. 475; *King* v. *Gillett*, 7 M. & W. 58; and *Bradley* v. *Milnes*, 1 B. N. C. 644, when *Tindal*, C. J., said, "A defendant is not to be allowed to join issue, and after taking the chance of a verdict to take advantage of an ambiguity in the language of a traverse."

properly received in evidence, not as proof of an usage binding on the parties, but as a means of ascertaining the practice of the Liverpool brokers, in order to determine what was a reasonable time, under all the circumstances of this case, for completing the contract. That was a question for the jury, who in this case have found by their verdict that a reasonable time has not been exceeded; and that being the case, the plaintiff is entitled to recover damages, to be calculated at the difference between the price at the time of the contract and of the re-sale. I do not see that they came to a wrong conclusion, and the recertainly was no misdirection.

GURNEY and ROLFE, Bs. concurred.

Rule discharged.

A rule *nisi* was accordingly granted on the other point.

J. Henderson now shewed cause (*a*).—Judgment *non obstante veredicto* is never given for a defendant upon an issue which he has joined or taken. The plaintiff's proposition here is, that, upon the contract admitted on this record, he had a reasonable time to transfer and deliver the shares. Suppose ten days to be a reasonable time, if the defendant came on the second or third day with the money, and asked for the shares, the plaintiff would not be deprived of his right to wait the ten days; that is the key to the whole question. The replication raises the question which decided the cause; it re-asserts the averment in the declaration, that the plaintiff in a reasonable time was ready and willing, *absque hoc*, that defendant was so. So that the question is simply this:—At one time the defendant was ready and willing to pay; but was that before or after the reasonable time for plaintiff being

(*a*) June 1st. Before Lord *Abinger*, C. B., *Alderson*, *Gurney*, and *Rolfe*, Bs.

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ready and willing to transfer? [Lord *Abinger*, C. B.—By *within a reasonable time*, he means *at a reasonable time*.] He means less than a reasonable time, which issue the plaintiff could not safely take. It is quite immaterial that you come in a reasonable time to pay, if such time has not expired for me to transfer. [*Alderson*, B.—It is perfectly consistent with these pleadings that the defendant in a reasonable time may have done what he alleges in the plea, and the plaintiff in a reasonable time what he alleges in the declaration.] Taking the whole record as it stands, the plaintiff has a perfect cause of action, as he has done no more than his contract allowed him to do.

Crompton, contrà.—The plaintiff says that according to his contract, by which he was bound as a sort of condition precedent to deliver the shares, he was ready and willing, but that defendant refused and discharged him from tendering a conveyance. The plea is that within a reasonable time defendant was ready and willing to pay, and requested the plaintiff to transfer, yet he did not, which is admitted by the replication. In contracts like this, of which time is of the essence, if either party breaks the contract, either in a condition precedent or concurrent, the other has a right to repudiate. *Lawrence* v. *Knowles* (*a*). This plea might perhaps have been demurred to as stating matter inconsistent with the declaration, but the plaintiff having pleaded over, admits a good repudiation on a precedent default. It is nothing that he re-asserts his count, he is not bound by his inducement; the only question he raises is by what follows the *absque hoc*. [Lord *Abinger*, C. B.—The question is, what has the plaintiff to prove? this is after verdict; he must have proved that he was ready, and the defendant not.] But we say he was not ready in a reasonable time; it must be taken to have all happened after the repudia-

(*a*) 5 B. N. C. 399.

tion, as he has not traversed it. We aver that we had a right to rescind, and did rescind; he does not traverse that, only our being ready and willing.

Lord ABINGER, C. B.—Suppose the law prescribed seven days as a reasonable time, and the plaintiff alleged that within seven days he tendered, and the defendant that in a reasonable time, to wit, two days, he was ready and willing, but that the plaintiff was not, and thereby discharged the contract. He should shew he was ready the whole seven days. The time in the replication is explained by the declaration. After verdict we must presume that the jury found it was in a reasonable time; therefore this rule must be discharged.

ALDERSON, GURNEY, and ROLFE, Bs., concurred.

Rule discharged.

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COURT OF COMMON PLEAS.

In Trinity Term, 1841.

June 8th.

BARNED *v.* HAMILTON.

In May, 1840, A. agreed with B. for the purchase of railway shares at £— per share. On the 4th of August A. writes to say, that "having received certain information as to some misrepresentation at the time of contract, he gives notice that he shall consider the contract null and void, should such information prove correct. On the 22nd of August he gives a verbal notice of his intention of abandoning the contract, which notice he confirms by a letter of the 24th, in which he refers to that of the 4th for his reasons. The shares were by consent formally tendered to and rejected by A. on the 20th of October.

ASSUMPSIT.—This was an action brought to recover damages for the breach of two contracts, by which the defendant had agreed with the plaintiff, through a broker, for the purchase of 200 shares in the Grand Junction Railway Company, about to be created by the directors. Plea—*non assumpsit*. At the trial before *Maule*, J., at the Liverpool Spring Assizes 1841, the usual sale notes between the defendant's and plaintiff's brokers for the purchase of 100 shares at £35 premium were put in, and it was proved that a similar contract was entered into by the same parties on the same day for the purchase of 100 more shares at 34*l*. 15*s*. per share premium. At this time the shares had not been created.

On the 4th of August the defendant wrote the following letter to his broker, who communicated it to the plaintiff's broker.

"Sir,—I have this day learnt for the first time that the real motive for issuing the contemplated creation of Grand Junction £25 shares, is for the purpose of reducing the rate of dividend below £7 per cent. for the half year; as the express understanding at the time you purchased me those £25 shares was, that a dividend would be paid on

In an action brought by B. for the loss occasioned by the difference between the price then and at the time of contract:—*Held*, that it was properly left to the jury to say when the contract was finally repudiated, and that they having considered it not to be so until the tender and refusal of the shares, and having given as damages the difference in value then, and not at the time of the notice given on the 4th or 22nd, the Court refused to grant a new trial.

them of not less than £7 per cent. per half year, less interest at the rate of £5 per cent. per annum, I give you this notice that I shall consider all the contracts which you have made for me null and void, should the information above-mentioned prove correct. Requesting that you will intimate the same to the various sellers,

"I am, &c.

"Liverpool, Aug. 4, 1840. "J. S. HAMILTON."

"Mr. Thomas Reid."

The following answer was returned by the plaintiff's brokers:—

"Liverpool, 5th August, 1840.

"Sir,—Late this afternoon we received a communication respecting the purchase through us of 200 Grand Junction £25 shares, annexing also a copy of a letter from Mr. Hamilton to you: but as we never entered into any stipulation or condition, either verbally or otherwise, beyond what appears on the face of our own and your contract notes, we cannot for an instant recognize your note above referred to, but shall without fail require the fulfilment of the contract made between us on the 28th of May last. "Yours, &c.

"W. REYNOLDS & SON."

"To T. Reid, Esq."

The shares were created at a meeting of directors on the 20th August, 1840, and, on the 21st, notice was given to the defendant that the shares were ready to be assigned to him. On the 22nd he saw Mr. Reid, and stated to him verbally his determination to abandon the contract, and on the 24th wrote him the following letter, which, with the result of the interview, Mr. Reid communicated to the plaintiff:—

"Liverpool, 24th August, 1840.

"Sir,—I beg to repeat what I stated to you verbally on Saturday the 22nd instant, in reply to your letter of the

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previous day, relative to the shares of certain principals (why not give the names?), that I refer you to my communication of the 4th instant, from which you will see my reason for considering the sale null and void is on account of misrepresentation at the time of sale.

"I am, &c.

"Mr. Reid." "J. S. HAMILTON."

Some communication took place between the attornies of both parties on the 16th and 17th of October relative to an amicable arrangement, but being ineffectual, the shares were formally tendered to and rejected by the plaintiff on the 20th of October.

The shares were sold on the 22nd of October for 5637*l.* 5*s.* leaving a difference between that and the price contracted for of 1337*l.* 15*s.* It was proved that on the 24th of August the shares averaged £31.

The learned Judge left to the jury to find the amount of damages, to be calculated at what the price of the shares was, when it was finally settled that the defendant would not take them, which his Lordship was of opinion was by the letter of the 24th of August, in which case the damages would be £575.

The jury, however, found for the whole amount of 1337*l.* 15*s.*, and *Talfourd*, Serjt., in the *Easter* Term following having obtained a rule *nisi* for a new trial, unless the plaintiff should consent to reduce the damages to £575, or such sum as the Court should think fit—

Channell, Serjt., now shewed cause (*a*), and contended that the repudiation of the 24th of August was only a qualified one.

Talfourd, Serjt., *contrà*.—It was quite clear that Mr.

(*a*) June 9th, before *Tindal*, C. J., *Coltman*, *Erskine*, and *Maule*, Js.

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Hamilton, by his letter of the 24th of August, referring to his previous letter of the 4th and to the interview which had taken place on the 22nd, absolutely annulled, and considered, and treated the contract as entirely void, and the damages should be calculated about that day; the subsequent tender was a matter perfectly unnecessary, and all that took place after that was mere matter of communication to avoid a law-suit if possible. The jury have acted contrary to the impression of the learned Judge, therefore, unless some arrangement can be made for some intermediate sum, this is a proper case to be re-considered by a jury.

TINDAL, C. J.—The question in this case is, whether the jury have calculated the damages on a proper principle, that is, whether the damages should have been taken according to the market price on the 20th of October or thereabouts, or on the 24th of August or thereabouts. That depends, as has been properly contended, on the question, on which of those days the repudiation of the shares by the defendant took place (*a*). I think the jury have come to a proper conclusion. The letter of the 5th of August is anything but a final repudiation, it leaves the plaintiff in doubt. That of the 24th of August is little more than a reference to the former, and puts the case on the same footing as the first; whereas I think it was the duty of the defendant to bring the matter to a final end, sufficiently precisely, and distinctly, to enable the plaintiff to act upon it without hazard or difficulty. In this case I am not prepared to say that the plaintiff might not have been in jeopardy if he had sold those shares on that day. Then look what further takes place; the transaction of the 16th and 17th of October, as to the tender of the shares, shews that both parties considered some-

(*a*) See *Stewart* v. *Cauty*, antè, p. 616.

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thing remained to be done. I think, therefore, the jury were right, and that this rule must be discharged.

COLTMAN, J.—If the party had acted on the letter of the 24th of August, I do not think the plaintiff would have incurred any great damage; but even that would have been a question for the jury. I think this is not so distinct a repudiation as was necessary, the letter of the 24th of August being but a reference to that of the 5th.

ERSKINE, J.—I am of the same opinion. There would have been no great danger in selling, for the words of the letter would have been taken most strongly against the writer; but then the second letter, by referring to the former, cast sufficient ambiguity on the terms of it to have justified the plaintiff in not selling at that time. It was a question for the jury, and I think they have decided properly.

MAULE, J.—The question is, whether the jury have given too much damages. The defendant, when called upon to complete his contract, says, (though I can see no grounds for the charge), that there has been some misrepresentation, in consequence of which he shall consider the contract null and void. If the shares had risen to £37 or £38, can any one doubt that the defendant might have written to say, he was now well satisfied that his information was incorrect?—still, if an action had been brought against him, the jury might have treated it, as against him, as a repudiation. But was it so distinct as to have obliged the plaintiff to treat it as such? The jury have thought not, and have only given the plaintiff the right damages, if they have not acted improperly. I rather suggested a different conclusion, but I left it to the jury, who were well qualified to consider it.

Rule discharged.

COURT OF QUEEN'S BENCH.

In Trinity Term, 1842.

1842.
June 4.

THE QUEEN *v.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

A Company under the powers of a railway act (4 & 5 Will. 4, c. lxxxviii.) purchased lands, on which they constructed a line of railway, and warehouses and station-houses for the convenience of passengers, and of

THE London and South-Western Railway Company, in and by a certain rate made for the relief of the poor of the parish of Mitcheldever, in the county of Southampton, on the 6th day of November, 1841, were rated at the sum of £4,320 as under, that is to say:—

London and South-Western Railway Company.	Railway, four and a half miles - -	£4,320

Upon appeal duly made against the said assessment, the

receiving and stowing goods. They were authorized and required by the act to provide locomotive power, and to let out their carriages, or allow the railway to be used by other persons who had themselves provided carriages to travel on it.

Section 172 provides, that all persons shall be at liberty to use the railway, on payment of certain tolls to the Company (the *maximum* of which is fixed by sect. 149), and subject to certain rules therein provided for, as to the construction of engines, carriages, police regulations, &c., which are to be according to the order of the directors of the Company. There was no corresponding provision as to the right to use the warehouses, station-houses, &c.

Section 157 provides, that where the Company shall carry for their own profit, they shall keep separate accounts, shewing the amount of tolls which they would have received if the conveyance of the goods and passengers had been effected by other persons; to which separate accounts the overseers of the several parishes, through which the railway passes, shall have free access. There was no provision for keeping such accounts when other parties carried the goods or passengers.

A subsequent act (1 Vict. c. lxxi. s. 82) recites the 157th section of the 4 & 5 Will. 4, and that it was provided by that act that such separate accounts should be kept when other parties carried the goods or passengers, and imposes a penalty on the Company in case of neglect to do so. The Company have not, in fact, leased the railway, nor have any other persons than themselves been carriers upon it.

Held, that the principle of rating was to be calculated according to the value of the land, as increased by the line of railway and buildings.

And that the Company were properly assessed upon the annual rent which a lessee, capable of deriving all the profits which now accrue to the Company, would give for the railway, with its fixtures and appurtenances, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, and deducting for repairs, insurance, and other expenses necessary to maintain the railway, its fixtures, and appurtenances, in a state to command such rent, and not merely for the tolls which the Company would receive for the use of the railway by others.

And that such amount was to be distributed amongst the assessments of the several parishes, in proportion, not to the length of railway, but the actual earnings in each parish.

1842.

THE QUEEN v. THE LONDON AND SOUTH-WESTERN RAILWAY CO.

Court of quarter sessions confirmed the rate, subject to the opinion of this Court, upon the following case:—

The London and South-Western Railway Company are established, and act under a certain act of Parliament (4 & 5 Will. 4, c. lxxxviii.), intituled "An Act for making a Railway from London to Southampton;" and four other acts (1 Vict. c. lxxi., 2 Vict. c. xxviii., 4 & 5 Vict. c. i., and 4 & 5 Vict. c. xxxix.), respectively intituled &c. Copies of these acts accompany the case, and are deemed to constitute part thereof, and may be referred to by the Court, or either party, at the hearing thereof(a).

(a) The clauses of the acts material to the case are as follows:—

The 4 & 5 Will. 4, c. lxxxviii. s. 149, empowers the Company to demand, receive, and recover, to and for the use and benefit of the said Company, for the tonnage of all articles, matters, and things, which shall be conveyed upon or along the said railway, any rates or tolls not exceeding the following, &c. (specifying them).

Section 150, empowers the Company to demand, receive, and recover, to and for the use and benefit of the said Company, for and in respect of passengers, beasts, cattle, and animals, conveyed in carriages upon the said railway, any tolls not exceeding the following, &c. (specifying them).

Section 151, empowers the Company to provide locomotive engines or other power for the drawing or propelling of any goods, articles, matters, or things, persons, cattle, or animals, upon or along the said railway or any part thereof, and to demand, receive, and recover such sum and sums of money for the use thereof as the said Company or the said directors may from time to time fix or require, in addition to the several other rates, tolls, or sums herein authorized to be charged and received.

Section 157 enacts, "that in all cases in which the said Company of proprietors shall carry for their own profit, any passenger, cattle, or other animals, goods, wares, or merchandize, articles, matters, or things, a separate account shall be duly kept, shewing the amount of rates or tolls which would have been received by the said Company for the use of the said railway in respect of such passengers, &c., *if carried by any other party or parties;* and *the overseers of the poor of the several parishes and townships through which the said railway shall pass, shall have free access to and liberty to inspect the same*, at any time during the first fourteen days in the months of July and January in each year."

Section 158, empowers the Company from time to time, and so often as they shall think fit, to reduce all or any of the rates, tolls, or sums by this act authorized to be taken, and afterwards from time to time again to raise the same or

Under the powers contained in these acts, or one of them, the Company have formed and completed a line of railway from Vauxhall, in the county of Surrey, to South-

any of them, so that the same respectively shall not at any time exceed the amount by this act authorized. (Proviso against partially raising or lowering the rates, &c.)

Section 164 enacts, "that the respective owners or persons having the care of carriages passing upon the said railway, shall give an exact and true account in writing, signed by them, to the collectors of the rates, tolls, or sums, at the places where they shall attend for that purpose, of the quantity of goods and other things as aforesaid, which shall be in their carriages so belonging to them or under their care, &c."

Section 165, authorizes the Company to carry and convey upon the said railway all such goods, articles, matters, and things, and all such cattle and other animals as shall be offered to them for that purpose, and all such persons as shall apply to be carried and conveyed along the said railway or any part thereof, and to demand, receive, and recover, to and for the use and benefit of the said Company, for such carriage and conveyance as aforesaid of all goods &c., and persons, carried and conveyed upon the same, in addition to the several rates and tolls hereinbefore authorized to be charged and received, such sum of money as the said Company or the said directors may from time to time fix and require.

Section 172 enacts, "that all persons shall have free liberty to pass along and upon and to use the said railway, with carriages properly constructed as by this act directed, upon payment only of such rates, tolls, and sums as shall be demanded by the said Company, not exceeding the respective rates, tolls, and sums by this act authorized, and subject to the rules and regulations which shall from time to time be made by the said Company or by the said directors, by virtue of the powers herein granted."

Section 173, provides against the use of carriages, unless constructed as directed by the Company.

Section 174. That no engines shall be used on the railway unless approved by the Company.

Section 179, empowers the Company from time to time to make orders, regulating the travelling upon and use of the railway, and for or relating to travellers and carriages passing thereon, and the mode, means, and speed of propelling the carriages, the times of departure and arrival, loading, unloading, weights, and delivery of goods, the prevention of nuisances, and generally for regulating the passing upon, using, and working the railway and other works by the act authorized.

1 Vict. c. lxxi. s. 82, recites section 157 of the former act, *and that it was thereby enacted*, "that the said Company should also keep a separate account of the amount of the rates or tolls which should from

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ampton, being a length of seventy-seven miles, and this railway, for four miles and a half thereof, passes through the parish of Mitcheldever aforesaid; and in pursuance of the powers and provisions of the acts, especially those contained in the 150th to the 161st section of the first-mentioned act, the Company have caused lists to be made of the several rates, tolls, and sums, which they have appointed to be taken and received by virtue of the said first-mentioned act; and the said Company have duly kept and do duly keep a separate account, shewing the amount of rates or tolls which would have been received by them for the use of the said railway, in respect of passengers, cattle, or other animals, goods, wares, &c., if carried by any other party or parties, to which said account the overseers of the poor, of the several parishes and townships through which the railway passes, have free access, and have liberty to inspect, in manner by the said act provided.

The sum which should have been so received by the Company for the use of the railway, by such other parties in the year next immediately before and up to the time of the making of the said rate, in respect of so much of the railway as lies in the said parish, amounts to 3,470*l.* 13*s.* 9*d.*, being such portion of the tolls as is earned by the railway Company in the said parish of Mitcheldever.

The whole sum, however, received by the Company for the conveyance of passengers &c. by the Company in

time to time be received by the said Company, for the use of the said railway, in respect of any passengers, cattle, and other animals, goods, wares, and merchandize, articles, matters, and things, *carried by any other party or parties*, and that the overseers of the poor of the several parishes and townships, through which the said railway should pass, should have free access to and liberty to inspect the same at any times during the first fourteen days in the months of February and August in each year. And whereas it is expedient, by means of a sufficient penalty, to insure the keeping and inspection of such accounts," imposes a penalty on the Company, "in case of neglect or refusal to keep such accounts, or to permit such inspection as aforesaid."

carriages provided, manned, and worked by the Company at their own sole expense, including the said sum of 3,470*l.* 13*s.* 9*d.*, amounts to £13,880 per annum, in respect of so much of the railway as lies in the said parish.

The former sum of 3,470*l.* 13*s.* 9*d.* constitutes the proportionate sum for the said parish, which any individual who contracted with the Company for the exclusive right to take tolls for the use of the railway by persons using the same, under the powers and subject to the regulations of the aforesaid statute, for the transmission of goods, cattle, and passengers, along the line, in carriages provided by such persons, would receive from such persons; and the sum of £1,293 constitutes the rent which a tenant from year to year would give to the Company for the exclusive right to receive tolls for the conveyance of goods, cattle, and passengers, in the manner mentioned in section 157 of the said first-mentioned act, along so much of the railway as lies in the said parish, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, and making allowance and deductions for the average annual cost of repairs, insurance, and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent.

The respondent parish contends, that the annual value is not to be estimated on the basis of the tolls alone, nor is to be limited to such tolls or their value; but that the advantage, which a lessee of the railway may be expected to derive from his lease by supplying power and by carrying upon it, may be taken into account.

That if a lessee is to be supposed capable of deriving from the use of the railway all the profits which now accrue to the Company from the conveyance of passengers, cattle, and goods, under the powers of their acts, such lessee finding locomotive power, carriages &c., and paying all expenses incidental to working the railway, then the whole railway, with its fixtures and appurtenances, might be rea-

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sonably expected to let from year to year at a rent which, for the purposes of this rate, may be assumed at £70,000 per annum at the least, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, and making allowance and deductions for the average annual cost of repairs, insurance and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent.

That supposing such rent to be given for the whole line, the proportion thereof in respect of so much of the railway as lies in the respondent parish is to be assumed to be the net sum of £4,320 *per annum*, being the amount at which the appellants were rated in the above rate.

The questions for the opinion of the Court are—

Whether the Company are rateable upon the principle contended for by them, or upon that contended for by the parish, that is to say,

Whether upon an estimate of the net annual value, obtained from the statement of the tolls which would be received by the Company, as aforesaid, forming the basis of the rent which a tenant would give as before mentioned, subject to proper deductions, or upon an estimate of the net annual value, as ascertained by a rent given by a tenant under the circumstances, and for the purposes above stated, as contended for by the parish.

Lastly, whether the annual value upon which the parish rate is to be made, should be such proportion of the estimated rateable value of the whole line (whichever basis is adopted by the Court), as the length of the part situate in the parish bears to the whole line, or such proportion thereof as the receipts actually derived from or in respect of the carriage of passengers, cattle, and goods, or from tolls upon so much as lies in the parish, bear to the same receipts throughout the whole line.

If the rateable value is to be proportioned to the length of the railway in the parish, and not to the receipts, then

the estimate as contended for by the Company should be the sum of £1,400 (*a*).

If it is to be proportioned to the receipts as above, and not to the length of the railway in the parish, then the estimate, as contended for by the parish, should be £3,800.

The rate is to be confirmed, quashed, amended, or sent to be reheard by the sessions, according to the opinion of the Court upon the above points.

Statement shewing the different amounts at which the Company would be rateable, under the different principles and data set forth in the case.

	On the footing of the Company being rateable, in respect of the parish of Mitcheldever, in the proportion which the length of line in that parish bears to the length of the whole line, without allowing any other consideration than the proportionate length to affect the question.	*On the footing of the actual earnings, in the parish of Mitcheldever, being the criterion of rate.*
1. On the footing of the Company being rateable in respect of tolls only.	£1,400	£1,293 (*b*).
2. On the footing of the Company being rateable, in respect of the tolls and and *other matters* mentioned in the case.	£4,320 (*c*)	£3,800.

(*a*) This point was abandoned on the argument upon the authority of *Rex* v. *The Inhabitants of Woking*, 4 A. & E. 40, where Lord *Denman*, C. J., in delivering judgment, says, "The true principle is this: a canal Company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profits which they derive from the use of their land in that parish," citing *Rex* v. *Kingswinford*, 7 B. & C. 242. See also *Rex* v. *The Cambridge Gaslight Company*, 8 A. & E. 73; and *Reg.* v. *The Bristol Dock Company*, 2 Railway Cases, 571, 585; 1 G. & D. 92.

(*b*) This is the rating contended for by the Company on the two principles of tolls only (as against profits) and actual earnings (as against proportionate length).

(*c*) This is the rating contended

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Sir *W. W. Follett*, Solicitor-General, *Cresswell*, and *Smirke*, in support of the order of sessions, (*a*).—It is admitted that the rate in each parish is to be calculated on the tolls or earnings in that parish, and not on the proportion which the length of the railway in the parish bears to the whole length of the line; the question, therefore, is upon what principle those tolls or earnings are to be estimated for this purpose.

Under their act this Company are entitled to a certain toll from those persons who use the railway, but they are themselves also entitled to use it with their own locomotive engines and carriages. If they had none of their own, but simply satisfied themselves with allowing others to use it, they estimate that the tolls in Mitcheldever would amount to 3,470*l.* 13*s.* 9*d.*, which is the first sum found in the case. Then a second sum is stated, which the Company, using the railway with their own engines and carriages, receive for so much of the line as lies in the parish of Mitcheldever; that amounts to £13,880. Those two are the possible and actual receipts. Then is stated what a tenant would give as yearly rent for the railway. That, if let with the exclusive right to take tolls for the conveyance of goods, but with a restriction that he shall not use it himself, amounts to £1,293. But if the railway were let with no such restriction, it is calculated that the rent for the whole line would be £70,000, and on that principle the portion allotted to the parish in question, calculated according to the actual earnings in that parish, should be £3,800. The point at issue, therefore, is this, whether the proper mode of estimating the annual rateable value is by taking the rent without any restrictions, or whether the Company is to be relieved from all further liability if

for by the parish, and confirmed by the Sessions, and is based on the two principles of profits (as against tolls only) and proportionate length (as against actual earnings).

(*a*) January 15 and 19, before Lord *Denman*, C. J., *Patteson*, *Coleridge*, and *Wightman*, Js.

they are rated for the portion of *tolls* which would be actually received in the parish.

The principle of rating would be perfectly clear but for one clause in this Company's act, (section 157), and if there could have been any doubt on the subject, it is to be remembered that this act was passed subsequently to the passing of the act to regulate parochial assessments (6 & 7 W. 4, c. 96) (*a*), which provides that all rates shall be made on the net annual value of the property to be rated. That was a legislative adoption of the various cases which had before that act made rent the criterion of rating. Here are persons occupiers of land for which they are rateable in different parishes. It is found that a tenant would give £70,000 for this property, according to the principle ascertained in the case of any other species of valuable property let with particular advantages, as docks, canals, or bonded warehouses, where the lessee is supposed to be put into the place of the lessor, with all his privileges. In *Rex* v. *The Birmingham Gas-light and Coke Company* (*b*), which was decided long before that act passed, it was held that the Company were not rateable for a sum equal in amount to that for which the premises would let to other persons willing to carry on the same business. That case has been confirmed by many subsequent decisions.

(*a*) Section 1 enacts, "that from and after the 21st of March, 1837, no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent; provided always that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable."

(*b*) 1 B. & C. 506.

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In *Rex* v. *The Oxford Canal Company* (*a*), (where one question was whether a mileage compensation duty payable to the Company was to be rated in every parish proportionally, or spread over the whole canal), *Abbott*, C. J., lays down the same principle of rating. And *Bayley*, J., in *Rex* v. *The Trustees of the Duke of Bridgewater* (*b*), says, "We have no doubt that the trustees must be rated as occupiers of land, and that the same principle of rating must be adopted, whether the party be owner and occupier, or occupier only;" and after noticing the fact that the trustees were carriers of goods, he adds,—"The principle of our decision in this case is, that the same rule is to be applied to all occupiers, and that the rent or sum at which the land will let is the criterion of the value of the occupation;" and in *Rex* v. *Tomlinson* (*c*), his Lordship explains the term *net rent* to mean "that part of the rent which goes into the pocket of the landlord, and which is the rent paid by the tenant, after deducting taxes and charges of collection." In *Rex* v. *The Inhabitants of Lower Mitton* (*d*), the same principle is expressly recognised. [*Coleridge*, J.—Is there any clause in this act empowering the Company in terms to let the railway?] They would not require an express provision for that purpose; by sections 27 and 50 the fee-simple is vested in them, which would give them a power to lease, and section 169 enables them to let the tolls. There have been several instances of such leases, as of the Bristol and Exeter Railway to the Great Western Railway Company, and of the Aylesbury Railway to the London and Birmingham Railway Company. [*Patteson*, J.—I suppose the rent of £70,000 is for the railroad only, the tenant providing carriages, &c.] For the railroad and fixtures, which according to *Rex* v. *Guest* (*e*) may be included in the rate;

(*a*) 4 B. & C. 74.
(*b*) 9 B. & C. 68.
(*c*) Id. 163.
(*d*) 9 B. & C. 810.
(*e*) 7 A. & E. 951.

and see *Rex* v. *The Proprietors of the Liverpool Exchange* (*a*); and *Regina* v. *The Cambridge Gas-light Company* (*b*). Whatever, therefore, be the *object* of the act, unless it alters the general law, and says the railway is to be rated differently from other hereditaments, (as in the acts relating to the Leeds and Liverpool Canal, the Regent's Canal, Bristol Docks, and others, where words of *proviso* are introduced, that they shall be rated proportionally to the adjoining lands, and not as improved (*c*)), the general mode of rating according to the larger liability will apply. Their answer to that is, that it is not denied that the railway will let to a tenant for £70,000, but that must be taken with a restriction on the tenant that he shall not use the railway himself, but only allow other persons to do so. On what principle is that restriction to be imposed? The tolls are not the whole value of the land; the profits of the land would be the tolls *plus* the value of the occupation.

But the 157th section contains no such enactment, and therefore makes no difference in the principle. It says nothing about the mode of rating, and its provisions cannot in any way shew the value of the railway as regards tolls, nor can that value be ascertained by them. It does not require the Company to keep an account of the actual tolls received, but only of what the toll would be of the goods carried by them if carried by other persons. But in this way it may be of use. It gives the overseers the means of ascertaining what is the actual business done by the Company. [*Patteson*, J.—If the keeping of these separate accounts is solely for the purpose of ascertaining what the Company actually receive, it is merely imposing a very troublesome calculation for no earthly purpose. If the rating is to be on the whole amount which the property would obtain in the way of rent, for the use of the railway by

(*a*) 1 A. & E. 465.
(*b*) 8 A. & E. 73.
(*c*) 43 Geo. 3, c. 140, s. 64; 2 Railway Cases, 578.

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a tenant, and not merely for the right to receive the tolls, these accounts would not assist the overseer in making the rate in any way whatever.] The clause was intended to assist the overseer in ascertaining what were the real profits obtained by the Company from different sources. But certainly the necessity to keep these accounts cannot affect the principle of rating; it would not assist it in any way: and although the clause may be introduced for the purpose of rating, it is not to alter the former way of rating; it is not a statutory enactment, that only so much shall be rated as would have been paid by persons using the railway. This advantage may also arise from it, it gives a *minimum*, and the overseers would, no doubt, be safe in only taking that sum; or if the carrying should turn out unprofitable, the Company would only be obliged to pay for the actual tolls. But in this case no toll is actually taken. The property is not like a canal, as was probably first contemplated; any person may use the railway with locomotive engines, but by using the railway themselves, the Company make a monopoly of it; for no third person can put on a carriage without being subject to all their regulations. No tolls therefore being taken, the test is perfectly illusory; it is only a declaration of what the Company are willing to take. The statute in sections 149, 150, studiously fixes a *maximum* of tolls; but there is no *minimum* fixed, and the toll therefore is arbitrary up to a certain limit. But section 158 gives them power to reduce the tolls; if therefore they are to be the only criterion, the Company have only to reduce them to little or nothing, and then they would not be rateable at all. If these separate accounts were not directed to be kept, they might make all their profits depend on their tolls or on their carrying business, and so render it impossible for any rate to be imposed at all. [*Coleridge*, J.—If so, how could they make a profit?] By being carriers; by sections 151, 155, 156, the charge for

carriage is unlimited. [*Patteson*, J.—If they reduced the tolls almost to nothing, they would tempt persons to come with their own carriages]. There is nothing in their act to prevent them from doing so. If the two statutes are inconsistent, the last must prevail. The proper mode, therefore, is to estimate the value which a tenant would give with the deductions allowed by the statute.

M. D. Hill, *Kelly*, and *Gunning*, contrà.—It being conceded that the rate must be calculated upon the produce of the railway in the parish in question, and not on a mileage, which would lead to great error, on that principle the rate will be fixed at £1,293 or £3,800, according to the opinion of the Court on the second and more important question.

The argument on the other side proceeded upon an erroneous anticipation of the points for which it was supposed that the Company would contend. It was suggested that they would argue that the 157th section of their act was to have the effect of altering the law, with respect to the principle of rating public undertakings of this kind. The Company do not so contend: they admit that the principle is the same as has been recognised by this Court in a great many cases; but they use that section to shew that the legislature, who must be supposed to have been well acquainted with those decisions, considered the amount of tolls which might be made, as *one medium* (not the only mode) of ascertaining the amount of rate which should be paid. There is no question about the law, but only the application of it. The Company rest their case and liability on the case of *Rex* v. *The Trustees of the Duke of Bridgewater* (*a*), which is admitted by the other side to be sound authority. In that case a canal had been made, the proprietors of which united in themselves two different

(*a*) 9 B. & C. 68.

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characters, that of proprietors and carriers, and a distinction was made between the liabilities of the two. They were entitled as proprietors to receive certain profits, and those profits were held a fit subject for rating; they were also entitled to and did receive great profits in their character of carriers, which were held not to be rateable. That case is clearly identical with the present. A canal is valuable to the proprietors of it, for the tonnage which they are entitled to receive from the public; a railway is valuable to the proprietors, *quà* proprietors, for tolls on carriages. So far the cases are the same. Again, it might happen that the same persons who were proprietors of a canal, and as such entitled to take tonnage, were themselves carriers, and received profits totally separate and distinct from the former. So with a railway Company; they may have their own engines and carriages, as a canal its boats and barges, and derive profits from being carriers; but for them, according to the case cited, they are not rateable. *Bayley*, J., says, "I lay out of consideration the fact of the trustees being carriers, because their occupation only is to be considered. The profits of carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them. The other sums received by them constitute the profits of their trade. The principle of our decision in this case is, that the same rule is to be applied to all occupiers, and that the rent or sum at which the land will let is the criterion of the value of the occupation." Let the same be done in this case; lay out of consideration the fact of the railway Company being carriers, because their occupation only is to be considered, and then there can be no doubt or difficulty in the case. The profits of carrying goods and passengers are the profits of their trade, and, as such, not rateable; but the tolls here, (as the tonnage there), which might be received if in other hands, are the real profits of the land, the proceeds from and in respect of the occupation of the freehold, and

therefore the real subject-matter of rating. Upon this principle, in *Rex* v. *Coke* (*a*) and *Rex* v. *Fowke* (*b*), it was held that lighthouses were not rateable for the tolls of ships passing within a certain distance, as they did not arise from the building nor from anything of necessity connected with it. And in the cases cited by the respondents, *Rex* v. *Guest* (*c*), *Rex* v. *The Proprietors of the Liverpool Exchange* (*d*), and *Regina* v. *The Cambridge Gas-light Company* (*e*), the particular advantages of building, &c., were taken into the account in estimating the annual value of the land, because attached to it by the express provisions of the legislature.

If, then, a distinction has been drawn by the Court, between liabilities as proprietors and carriers, why should it not be so here, when the Company, who receive no tolls in fact, but derive all their profits from carrying, are compelled by the legislature to keep the aggregate amount of tolls, both received and receivable, (which would apply as well to tolls receivable from strangers as payable by themselves), upon the traffic along the railway; both of which accounts are to be open to the inspection of the parish officers? The introduction of such a clause (*f*), directed not to the public in general but *to the overseers*, could only be intended to shew to them the elements and constituent parts of rating, and so to enable them to ascertain the profits for the purpose of discharging their duty of assessing the railway. And if priority of time were of any importance, which it is not, that act was passed since the Parochial Assessment Act, which however introduces no new liability; nor does it alter the previous mode of rating in any respect.

The case on the part of the respondents gives two points

(*a*) 5 B. & C. 797.
(*b*) Id. 814, n.
(*c*) 7 A. & E. 951.
(*d*) 1 A. & E. 465.
(*e*) 8 A. & E. 73.
(*f*) See 1 Vict. c. 71, s. 82, antè, p. 3, n.

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of supposed advantage to determine the amount of rent. First, the advantage which a lessee of the railway may be expected to derive from his lease, by supplying power; and secondly, by carrying upon it.

1. It is denied that the lessee, under a lease of the entire railway, in this case could derive the slightest advantage by supplying power, and it is a fallacy on which the whole argument on the other side rests. Suppose a lease were actually granted by the Company, not of the tolls, but of that in respect of which they are now sought to be assessed, the land, the soil, *the railway;* what are the advantages a tenant would derive—what would pass under such a lease? There is no clause enabling the Company to lease, it may not have been contemplated, nor is it necessary for the argument. But suppose they had such a power, and had exercised it, what would be the thing demised for which the £70,000 *per annum* is to be paid, which the case states a tenant would give upon a lease of "the railway, its fixtures, and appurtenances"? A great variety of matters, more than could pass under a lease of the mere railway. The lessee would derive no advantage from supplying power, for he would stand in the same situation as to that, that he, in common with the rest of the public, does at present, for every individual has now power to do it, on paying certain tolls. (The London and Brighton Railway, like any other carrier on the Greenwich and Croydon railways, pay toll for running their own engines and carriages thereon.) The value to the lessee is not increased by that; he would be paying additional rent for what he does not receive from the Company, but has already. It is contended that the fact of his being lessee would give him additional facilities for this purpose. But that is not so; if the railway were so demised, the Company might continue to act with their own carriages as carriers, and the lessee would derive nothing but from the right of taking tolls, and using the railway himself. It is not like

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the case of a public-house; there the lessee has the facility of obtaining a licence, which he may or may not obtain; but if he does, he can turn it to account in the premises, which nobody else can do. The Company are rated for the railway, no doubt increased in value by circumstances, but only such circumstances as a tenant would take under a lease. It might be, if the Company were not only to demise the railway, but covenant that they would not carry, and also demise the station-houses, engines, and carriages, and prevail on their clerks and officers to continue their services, that under such an instrument, considerably more would be given for such advantages, but that would not be a lease. [*Coleridge*, J. —Suppose the Company let their tolls to one person, and their railway to another, what would the railway be worth?] Nothing. That forms an unerring criterion. Suppose there were a lease of tolls on the 1st of January, and of the railway on the 2nd, what conceivable advantage could be derived? All the rent would be paid for the railway in a state of perfection, not for the land; that cannot be built upon, or turned to purposes of cultivation, for if applied to other purposes than those of a railway, the compulsory powers cease (by section 212), and the land reverts. If they choose to sell their stations, carriages, &c., to another, the vendee would have much greater facilities of using the railway for the business of a carrier than the lessee, but would not be rateable. It is also clearly to be collected from the case, that the station-houses are separately and distinctly rated: the rate of the railway is for the mileage, and it cannot be supposed that the parish officers are so negligent as to omit such buildings. [Lord *Denman*, C. J. —I think it is quite clear we are to consider what the Company are to receive from the subject-matter of the rate, which is stated in the case; and cannot look to anything beyond that.] The question is then, what would a tenant give for the railway as it now is; but the profits of

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personal property which the Company, while they let the railway, might sell to another person, are not to be introduced into the amount of rent (*a*). The tenant would derive the exclusive right of taking tolls, but not of supplying power.

2. The same observations will apply to the advantage which the case states might be gained by *carrying* on the railway. It is a fallacy to say, that, because this Company are the first in the field, and have carriages &c., any tenant would be content to pay a rent, proportioned, not to the railway, but to the various facilities for making money upon it. The Company have a monopoly in fact at present, receive no tolls, and have the whole railway for their own use; but they are not to be rated for that; they could not, in a lease of the land, grant a lease of such monopoly; it might cease to-morrow, and they cannot by law lease it. The profits made by the conveyance of passengers, cattle and goods, cannot be taken into account as the basis of rating without overruling the case cited of *Rex* v. *The Trustees of the Duke of Bridgewater* (*b*). They may possibly be an important ingredient in ascertaining what a lessee might receive as tolls, and for that purpose might be useful; but in no other way could they be considered.

The sum, therefore, in respect of which the Company admit they ought to be rated is £1,293. After setting forth that they have kept the accounts, required by section 157, of tolls which might have been made, they give the accounts, and contend that the exclusive right to receive such tolls is all that a lessee could derive under a demise of the railway. The law does not admit of a rate upon *tolls*, but may be estimated on what they would let for. The tenant would take nothing but that exclusive right. [*Patteson*, J.—I doubt whether such a lease would give the power

(*a*) 3 & 4 Vict. c. 89. (*b*) 9 B. & C. 68.

to take the tolls at all; they have only power to lease the tolls *nominatim*.] Even supposing the legislature had introduced a clause empowering them to do so in a demise of the railway, nothing beneficial besides would pass to the lessee. [*Coleridge*, J.—You assume that what would pass by the lease necessarily measures the rent; I do not think that is all that is to be considered.] The test is, what a tenant would pay for what passes by the lease upon an average, not upon occasional profits, so as to make the amount depend on accident. *Rex* v. *Adames* (*a*). In the case of two adjoining closes, the possession of one would add considerably to the enjoyment of the other; but, unless it were let, the tenant would not pay more, because it happened to be in existence. The case must rest on the 157th section at last. If the Company let the tolls and continued to be carriers, they would pay toll to their lessee, so that the amount of tolls which the public would pay and the tenant receive, must be the criterion of the rating, for every thing else he could only enjoy in common with the Company and the public.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—This case has stood over for consideration for some time, on account of its novelty, and its supposed application to the rating of Railway Companies in general for the relief of the poor. It must, however, be determined on its own state of facts. The question raised is, whether this Company, being in occupation of its own railway, and at present in fact in the exclusive use of it, for the purpose of a large carrying trade, the rateable value of such occupation is to be taken only on the amount of certain tolls which have been fixed, under the statutes hereinafter mentioned, as payable generally by all carriers for the use of the railway, but which are in fact never paid,

(*a*) 4 B. & Ad. 61.

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or on the general amount of the profits which the Company in fact receive from the occupation so devoted to such carrying trade. Another question was indeed raised as to the mode of measuring the rate, upon whichever of the two principles it was to be calculated; namely, whether it was to be measured according to the proportion which the mileage of the railway in the respondent parish bears to the whole length of the way, assuming the profits to arise equally through the whole, or according to the actual earnings in the parish. This question, however, was not much argued, it being conceded ultimately that the latter was the proper mode; and the result was agreed to be that the rate ought to be for £3,800 if the parish were right, and £1,293 if the Company's act limited their responsibility to a rate in fact on the tolls only. The railway has been formed and is regulated under the authority of several statutes. By the first, the 4 & 5 Will. 4, the proprietors were incorporated and authorized to purchase lands in fee-simple, subject to certain qualifications not material to be noticed. Upon the lands so purchased they are to make and maintain a railway with warehouses, stations, landing places for the purpose of locomotive engines, carriages, and waggons, &c., and for loading, unloading, landing, &c., of goods, and the approach and departure of passengers for conveyance. For the tonnage of goods, and in respect of passengers, beasts, cattle, and animals conveyed in carriages on the railway, and also for carriages conveyed on it, they may demand certain tolls, of which the maximum is fixed and not the minimum; and further, they may themselves provide power for the propelling of persons and things, or they may themselves convey such persons and things on their railway, for which, in addition to the before-mentioned tolls, they may charge such sums as they may from time to time fix. The Company may therefore be simply the owners of the way, on which others may place steam-power and carriages, and

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convey persons and goods; and these two parties would then stand much in the same relation to each other as the trustees of a turnpike road, and the coach and post masters conveying passengers upon it. In this case they would receive the tolls only: the owners of the steam-power and carriages, the fares or remuneration for the conveyance; and it would be of course the interest of the Company to raise the tolls to the maximum, or as near to it as the competition of the ordinary modes of travelling would allow. On the other hand the Company may avail themselves of the latter clause, and unite both characters, of owners of the way and carriers upon it; they would then receive both the tolls and the fares. In both cases the persons or owners of goods conveyed must pay both the tolls and the fares; but in the latter, as the Company would be the first and last receivers of the fares and tolls, they might be charged as well as paid in one undistinguished sum; there could be no division: and supposing the Company to be the only carriers, there could be no necessity for fixing any rate of toll at all; the whole payment might just as well be considered as a fare. This appears in fact to be the existing state of things; but the statute, section 157, has provided that where the proprietors shall carry for their own profit, a separate account shall still be kept, shewing the amount of toll which would have been received by them merely for the use of the railway, if such conveyance had been by other parties, to which account the overseers of the parish shall have access during the first fourteen days in July and January in every year. But this act makes no provision for such an account being kept and open to the same inspection, where other parties do in fact convey on the railway, when it would be equally necessary—an indication, it may be thought, that the framers of the act did not seriously contemplate, what in truth has not happened, and probably never will happen, that any parties but the Company would ever become carriers on

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the railway. By the second act, however, which passed in 1837 (*a*), this 157th section is referred to, as if it directed that a separate account should be kept in both cases and be open to inspection, and the neglect to keep it, or refusal to permit its inspection, is subject to the very heavy penalty of £300, and £50 per diem for its continuance.

The effect of these clauses on the argument we must consider in the sequel. By the 172nd section of the first act all persons have free liberty to use the railway with carriages properly constructed, on payment only of the rates, tolls, and sums demanded by the Company, and subject to the rules and regulations which they shall from time to time make. The construction of such carriages must also be agreeable to the orders of the Company, and approved by their engineer or agent. But although the railway itself is thus, under certain qualifications, thrown open to the public as a highway, no corresponding provision appears to have been made with regard to the warehouses, wharfs, stations, or landing places. Both of the statutes before mentioned contain powers for the purchase of forty additional acres, eighty in the whole, for the erection of stations, yards, wharfs, and warehouses, and other similar erections and conveniences for receiving, depositing, loading, and unloading goods, and other purposes connected with the undertaking; but as to these lands, neither statute gives the public any right of access or user adverse to the Company; and the use, for any thing that appears, might be denied to any individual desiring to become a carrier on the railway.

These are the material facts and provisions which the case states, and the statutes supply; and to these we are now to apply the rule of rating prescribed by the 6 & 7 Will. 4, c. 96, s. 1. The 3 & 4 Vict. c. 89, was referred to in the argument, but it has, in truth, little or no bearing on this question. It prohibits a rating of any inhabitant, as such

(*a*) 1 Vict. c. 71, s. 82.

inhabitant, in respect of his ability derived from the profits of stock in trade, or any other property, to the relief of the poor; but it expressly leaves unaffected the liability of any occupier of lands or houses to be taxed under the provisions of the 43 Eliz. and the 13 & 14 Car. 2. Under the 6 & 7 Will. 4, c. 96, the rate must be made on an estimate of the "net annual value," and that value is declared to be "the rent at which the hereditaments might reasonably be expected to be let from year to year, free of all usual tenant's rates, and taxes, and tithe commutation rent-charge, if any, necessary to maintain them in a state to command such rent." To this enactment is added the proviso "that nothing in it shall be construed to alter or affect the principles according to which different kinds of hereditaments were, at the time of its passing, by law rateable."

The argument for the Company may be stated shortly; it is clear, and if it be applicable to the circumstances, convincing. It is that, in order to apply the statute, it is always necessary to suppose the property, in respect of which the rate is imposed, let from year to year. The portion of the railway in the respondent parish must therefore be supposed to be so let; and in order to estimate the rent, it must be asked what the tenant would take by the demise: the answer to which would be, a portion of the railway itself, and the perception of the tolls as before fixed by the Company. He would have the right to place his own carriages on the railway, not in virtue of the demise, but in common with all the world. The gross rent, therefore, would be something less than the amount of the tolls, by the allowance for tenant's profits; and after making therefrom the statutable deductions, the residue will be the net annual value on which the rate is to be imposed. If, because the lessee in occupation should place carriages on the railway, and derive therefrom a profit, you were to rate him in respect of that profit, you might equally rate any other carrier using the railway, but having no interest

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in it; for the user in the case of a lessee is not referable to his occupation under his demise. This, therefore, would be in violation of the statute. We forbear to notice at present the subsidiary parts of the argument. It is obvious that the case here supposed, which is that of a lessee in exclusive perception of the tolls on a railway practically open to rival carriers, is one very different in fact from the case before us—one, moreover, which not only has not occurred, but from the nature of things, it may be safely said, never can occur. The supposition of a lease of a portion of the railway, with no demise of the stations, warehouses, and approaches to it, or at all events some provision for the use of them, is merely absurd. Such a lessee would be a mere toll-collector for the Company, without even, as it should seem, any convenient mode of collecting the toll. The supposition, again, of a free competition of carriers on the same railway is practically little else than absurd. If all difficulties were removed as to the stations, warehouses, landing places, and approaches, and all these were supposed as much laid open to the public as the railway itself, the very nature of the mode of conveyance forbids the free competition of rival carriers. But how can we suppose any competition possible with the Company now the carriers, or indeed any free use of the railway, even by a private carriage, the Company retaining the independent occupation and control over all the existing approaches? Nay, a lease which should include the stations and warehouses, and approaches, and place the lessee, as to extent of occupation, in the same position exactly in which the Company now are, would not be without its difficulties; for the Company's act is framed, whether effectually or not, with some regard to the interest of the public as well as the Company. The travelling and conveyance, by carriages drawn or propelled by locomotive engines, are attended with peculiar and very alarming risks. Many regulations of police, therefore, are enacted,

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which the Company are charged to enforce; and it is very questionable whether their lessee could be their delegate as to this trust, while it is certain that the Company out of possession could not discharge the duty so conveniently or perfectly as they now can.

These are considerations which make us pause in giving our assent to the arguments which suggest themselves. The proviso in the 6 & 7 Will. 4 declares, that the principles of rating are not to be altered or affected by it. It is, therefore, important to consider how, under the circumstances stated in the case, the Company would have been rated if that act had not passed. They would then have been found occupying buildings and lands on an entire line of railway, and carrying on a trade not merely therein and thereon, but thereby—a trade inseparably connected with such buildings and such lands—a trade that could have no existence without the buildings and lands, and but for which the buildings would not have been erected or occupied, and for the sake of which, in great measure, the lands themselves are occupied in a particular manner. The profits of this trade would be included in the fares received for the conveyance of goods and passengers; and the question would be, whether those profits ought in any and what degree to affect the rateable value of the lands and buildings.

There is a class of cases often cited, which has established the principles on which this question is to be answered. We allude among others to *Rex* v. *St. Nicholas, Gloucester* (*a*), and *Rex* v. *Bradford* (*b*). In the first, a steelyard, part of a machine in a street leading by a house, was in the house; sums were paid by persons for weighing their waggons and carts, but those persons were not compellable to weigh them. Without these profits the house was worth £5 a year; these profits were worth about £40; and these, after due deduc-

(*a*) Cald. 262. (*b*) 4 M. & S. 317.

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tions, were included in the rate, as enhancing the rateable value of the house. The Court thought rightly so. Lord *Mansfield*, C. J., considered the house and machinery as one entire thing. "The principal purpose of the house," said he, "is for weighing. The steelyard is the most valuable part of the house." "If," said *Willes*, J., "a billiard table stands in a house, and the house should in respect of such table be let at a higher sum, it is rateable, while the table continues there, and it is so let, at the advanced rent." *Buller*, J., said,—"There is an extraordinary profit arising from the modification of the enjoyment. The only question, therefore, is, whether a man shall be rated for the property he has. If a house to-day is let for £30 a year, and to-morrow, if turned into a shop, would let for £50, when it is turned into a shop it shall be rated at £50." The Court clearly regarded neither the nature of the source of profit, nor its purpose. They looked only to the existing value of the subject-matter of the rate—the house, and rated it according to that value.

This principle had become so well established by the time when *Rex* v. *Bradford* (*a*) came before the Court, that it was then sought not to deny, but to evade it, by demising the canteen, and the privilege of using it as such, and selling liquors therein, at two distinct rents, in the hope of successfully contending, that the rate should be on the rent of the house only. The Court, however, looked to the substance, not the form, and held both sums to be parts of one entire rent, paid for the occupation of the house and the enjoyment of the advantages, which for the time belonged to it, and for the time enhanced its value. As in the former case people might cease to weigh at the engine, or the engine might be removed; so in this, the barrack might cease to be occupied; the customers being all removed, the license to sell liquors might be withheld or forfeited; still,

(*a*) 4 M. & S. 317.

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while these remained, and so the additional value was sustained, that value, it was held, must come into the rate. And, as *Le Blanc*, J., expressly said, this was not rating the canteen man "in respect of the profits of his trade, but only in respect of the rent which he paid." The occupation of the house was indeed necessary for earning the profits of the trade, but the house became more valuable because it enabled the profit to be earned. How it became valuable the overseers were not to inquire. Finding it so, they were to rate the occupier according to that value.

We are now to consider a case on which much reliance was placed by the appellants: it has been always considered a leading one, and we think will not, upon examination, be found to conflict with the preceding; we mean *Rex* v. *The Trustees of the Duke of Bridgewater* (*a*). The question there was simply this; whether, when the other occupiers of lands in the parish were rated on four-fifths, not of the actual value, but of their rents taken as the value, the appellants ought, being the owners as well as the occupiers of land covered by water and used as a canal, and from which the case found they derived no profit, except from the tonnage of goods carried on it, to be rated at four-fifths of the gross receipts of such tonnage. The Court determined, as might have been expected, that equal allowances must be made in both cases. The rent, or the sum at which the land will let, is the proper criterion; but the rent, they said, is not supposed here to be the value of the land or of its produce, *minus* the expense of producing, but the value after deducting the expenses of cultivation and the farmer's subsistence, and on this supposition it is clear the rate was unequal. This was all that was decided. The trustees were also rated as the occupiers of warehouses &c. adjacent to the canal; but as to these, by arrangement, no question was to come before

(*a*) 9 B. & C. 68.

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the Court; and they were also carriers on their own canal, and received freight as such for goods carried, in which the tonnage was included in the rate on the canal. The question being thus confined to the canal, and the trustees, as carriers, merely using it as any other person might and did, their characters of occupiers of the land and of carriers were quite distinct. The tonnage strictly respected their profits in the one, the freight their profits in the other. These last were unconnected with the land, did not add to its value, and therefore were properly excluded from the rate.

Let now the principle which these cases establish be applied to the facts before us, if we wish to know whether the fares would have been properly included in the rate before the assessment act passed. We apprehend that, according to that principle, the only question to be asked would be, do they increase actually the value of the buildings and lands on which the rate is to be made? If they do, and to whatever extent they do, to that extent, due allowances always being supposed, they must directly or indirectly be included. It would be no answer to say that by law the railway is a highway, that all the world may carry goods and passengers on it, that it is an accident that the Company alone monopolize all the trade, and that their monopoly may cease to-morrow. These, so far as they lessened the value of the buildings and lands, would be proper to be taken into account as to the quantum of the rate, but that would not affect the principle.

Then, do the fares increase the value of the buildings and lands? No one can doubt it; indeed the case has answered that they do; that a higher rent for the buildings and lands might be obtained, in consequence of the facility afforded by the occupation of them to the carrying on a lucrative trade, and earning the profits on those fares. The case thus supposed would be exactly the same in principle as that of the house and engine, the house and billiard table, the house converted into a shop, the canteen.

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It would be distinguishable from the canal case, because there by agreement the warehouses &c. were laid out of consideration. The trustees were, in fact, only carriers in common with all the world, and to the extent in which their trade on the canal did augment the value of the canal, it was brought into account.

But it will be observed that so far we have supposed lands and buildings, the railway, and the stations, &c. all in one parish and included in one rate. Will it make any difference in the principle that the railway is in more parishes than one, and that we are now dealing with a parish in which, so far as appears, there is no station-house or other appendage to the railway? We think not. The subject-matter of the rate in any particular parish is, no doubt, the beneficial occupation of the land there, and you cannot draw into the rate the value of the occupation of buildings elsewhere; yet as you are to rate on the value in the parish, however occasioned, you cannot strike off any portion, because it would not have existed but for the occupation of buildings in another parish; still it exists, and in the parish, and therefore cannot escape the rate there. Suppose A. B. occupying an entire tenement, as an inn, in two parishes C. and D., the lodging part of the buildings in C. and the tap and stables in D., there would be two rates; but could the owner say in C., "True it is that which I occupy here is, *de facto*, more valuable than a mere dwelling or boarding house; but that is in a great measure because it is connected with the tap and stables in D.; you must reject whatever is valuable to that connection, and rate me here as if I occupied the inn without the tap or stables; you must suppose a demise only of the part in C., and rate on a rent to be given only for what that demise would pass to me?" The answer would be, if the occupation of this part is, in fact, of a certain increased value, whether that increase be derived in part or in the whole from the other is immaterial. Wherever the valu-

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able occupation is, there the occupier must be rated in respect of it.

Then, in the present case, it would become a question of fact—Is the land occupied in the respondent parish by the railway more valuable in fact to the occupier by reason of his occupation together with the stations &c. elsewhere, and the general purposes to which all together are applied? We suppose that without doubt this would be answered in the affirmative. Sever it from them, and three or four miles of railway, unapproachable, from and to no place, having no connection with any termini, would be absolutely useless and unproductive. Give them the connection which in fact exists, you give them a value increased indirectly from the stations, warehouses, and portions of the entire line in other parishes, and directly from a general traffic, to the profits derived from which every where they are indispensable contributors, and through one part of which they directly come.

We are thus led to the conclusion that if this case had been to be considered before the passing of the Parochial Assessment Act, the principle of rating on which the respondents have proceeded would have been found the true one. Has then the statute made any difference in this respect? Now, without having recourse to the express language of the proviso, it is clear that the enacting part introduced no new principle of rating. From the time of the decision in the case of *Rex* v. *The Trustees of the Duke of Bridgewater* (*a*) before referred to, it had been understood generally that, fraud apart, the rent, whether the occupier was the owner or only the tenant—in the former case a supposed, in the latter a real rent—was to be the criterion of rateable value. Both parties in the present case appeal equally to this criterion. The difference between them is, there being no real demise, what is to be brought into the supposed demise; and as to this it is obvious the

(*a*) 9 B. & C. 68.

statute can make no difference, the only question between the parties being as to the proper mode of applying the admitted principle. In cases on rating, in which the great objects are to procure equality, and to bring every thing into contribution which ought to share the public burthen, it is essential (as Lord Ellenborough, C. J., said, in *Rex* v. *Bradford* (*a*)) to regard the substance and not the form. "We must," said he, "judge of things as they really are, and not as they appear to be; and therefore we are to consider here whether this be not substantially one entire rent in respect of one entire subject, though artificially divided into several payments." If we deal with this case in the same sensible and just way, we shall be at no loss to see, that to break up this entire line into parochial portions, and then in imagination to sever all and each from the buildings which the occupiers occupy together with it, *de facto* exclusively and under the authority of the same statutes passed in furtherance of one great scheme, and then again in imagination to sever both from the traffic which the occupiers carry on in, by, and throughout the whole *de facto* exclusively, and for the sake of which they have made, built, and occupy the whole, is to apply the principle of the statute in form and not in substance, and so as to lead to a mere evasion of its object.

If it be said that, by not only law, but in fact, the Company may lease their line and become mere carriers on it, or that they may demise their buildings and carriages, cease to be traders, and become mere occupiers of the railway; the answer is, that the present rate, with which alone we have to deal, is not made on either of those states of facts; that whenever either shall arise, the rate must be altered to meet it; but that even then, in all probability, the result to the parish would be much the same; the rate only would become apportionable between two classes of occupiers, instead of being chargeable on one.

(*a*) 4 M. & S. 717.

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But it is said that the private statutes conclude this question by the clauses referred to in the earlier part of this judgment, directing, under a severe penalty, a certain account of tolls to be kept for the benefit of the overseers of the poor. It is asked what object can be conceived for that provision as to the tolls alone, unless the tolls alone be the fund with which the overseers have to do? Some answer was attempted to be given to this question in the argument, but not, we think, very successfully. The truth is, that the counsel for the appellants very much overrated its importance in the argument. The framers of this statute, which must not be dealt with, when we are talking of intention, exactly as if it were a public general act, but rather as a mode of carrying into effect a bargain between certain individuals and the public, no doubt intended to limit the rate (if by law they could) to the tolls alone, and these clauses were inserted to effectuate the working of that mode of calculating the assessment, if it should prevail.

We have already noticed the omission, remarkable enough, in the first act, and the awkward mode in which it is attempted to be supplied in the second; but we are not now construing these clauses; we are only considering the collateral bearing on the argument which their insertion in the act has. All that need be said therefore is, that that bearing is not strong enough to prevent the application of the general principles of law to the rating of the Company's property in their occupation. We conclude, therefore, in favour of the respondents' principle. The sums are agreed between the parties; and we decide in favour of the larger, by the application of admitted principles to the facts, thinking that that represents truly the actual rateable value of the land occupied by the Company in the respondent parish.

Rate amended by inserting the sum of £3,800, instead of the sum stated in the case.

COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1841.

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THE QUEEN *v.* THE SHERIFF OF WARWICKSHIRE. *Nov.* 23.

IN this Term, *Whateley* had obtained a rule *nisi* calling upon the sheriff and under-sheriff of the county of Warwick to shew cause why a writ of *mandamus* should not issue, commanding them to review the taxation by the said under-sheriff of the costs of an inquisition taken and held before him on the 19th June, 1841, for the purpose of assessing the sum of money to be paid by the Birmingham and Gloucester Railway Company for the purchase of certain land belonging to W. Parkes, and for the injury, loss, and damage sustained by him by reason of the formation of the said railway and other works connected therewith. The principal facts of the case were as follows:—Mr. Parkes was the owner of some freehold land in the county of Warwick, part of which was, in March, 1837, taken by the Railway Company for the purposes of their act. Mr. Parkes having complained of the injury thereby done to his property, the usual precept was issued for ascertaining the damages, and the jury assessed them at £520, namely, £20 for the land taken, and £500 for the

A railway act, (6 W. 4, c. xiv.) provided (s. 78) for summoning a jury to assess compensation in case of disagreement respecting the purchase of land, and *that the party claiming compensation should be plaintiff, and have all such rights and privileges as plaintiffs in actions at law are entitled to.* Section 83 enacted, "that in every case in which the verdict of the jury shall be given for the same or a greater sum than shall have been previously offered by the Company, *all the costs of summoning such jury, and the expenses of witnesses* shall be defrayed by the said Company; if for a lower sum, then one moiety by each of the parties." Section 84 provided, "that all parties with whom the Company shall have any such dispute, and who shall require a jury to be summoned, shall enter into a bond to bear and pay their proportion of *the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses,* in case any part of such costs and expenses shall fall upon them."

In a case where no offer had been made by the Company, but a jury had been summoned and assessed compensation to the claimant:—*Held,* that the above clauses (notwithstanding the provisions of s. 78), did not entitle the claimant to the costs of the attorney's letters and attendances, nor to the expenses of plans, &c., paid to surveyors not called as witnesses.

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[illegible] But it is said [illegible] aid. On the 26th [illegible]
question by th[illegible] ny and plaintiff [illegible]
this judgmer[illegible] under the [illegible]
account of [illegible] heriff [illegible]
of the pc [illegible] ter [illegible]
that pr [illegible] ach [illegible]
be th[illegible] were not called as [illegible]
an[illegible] [illegible]r to 78*l.* 6*s.*, which it was con[illegible]
[illegible]riff had no power to allow. A written
[illegible] payment had been served upon the Com-
[illegible], and a distress warrant was about to be issued, but was put off by the magistrates to give the parties an opportunity of applying to the Court to order the sheriff to review his taxation. [He cited 5 Bacon's Abridgement, 251, "Mandamus," and *Rex* v. *The St. Katharine's Dock Company* (*a*).] (*b*)

(*a*) 4 B. & Ad. 360.

(*b*) The material clauses of the act (6 W. 4, c. xiv), are the following:—

Sect. 78 enacts, "That in cases of disagreement &c. respecting the purchase-money, satisfaction, recompense, or compensation for lands taken, used, damaged, or injuriously affected by the execution of the powers of this act, a jury shall be summoned by warrant from the Company to the sheriff, &c., and an inquisition shall be held and verdict given in the manner therein stated; and the sheriff &c. shall give judgment for such purchase-money &c. as shall be assessed by such jury, which said verdict and judgment shall be binding and conclusive to all intents and purposes upon all corporations and persons whatsoever. Provided always, that in such inquiry the corporation or person claiming compensation shall be plaintiff, and shall have all such rights and privileges as plaintiffs in actions at law are entitled to."

Sect. 83 enacts, "That in every case in which the verdict of a jury summoned as aforesaid shall be given for the same or a greater sum than shall have been previously offered by the said Company, for the purchase of any lands to be used or taken by them for the purposes of this act, or as satisfaction, recompense, or compensation, for any damage or loss which may happen or arise in the execution of any of the powers hereby granted, *all the costs of summoning such jury, and the expenses of witnesses, and of the bond to be entered into as aftermentioned*, shall be defrayed by the said Company; and such costs and expenses shall be settled and determined by the said sheriff, &c.;"

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Clock, Attorney [illegible] case the sheriff [illegible] in question. [illegible] the act. [illegible] language of the [illegible] sheriff [illegible] 71 & 72) [illegible] points [illegible] Court [illegible] not [illegible] was held, and the [illegible] [illegible]led [illegible]ion. The Company contend that [illegible], compelled to pay the costs of summoning the [illegible] expenses of witnesses, and of the bond. It is submitted that, under sect. 78, the plaintiff would be entitled to the ordinary costs of trying any inquisition or issue, as the Company have made no offer; the 83rd section, which relates to the costs to be paid by them, apparently referring only to cases where the sum awarded is equal to or greater than the tender or offer. The literal meaning of the words in the 83rd section cannot be the true limit; the 84th carries it further, and the proper course is to put a reasonable interpretation on the two sections taken together. "Taking a verdict" does not mean literally the act of the officer,

(and in case such costs and expenses shall not be paid, the same may be levied and recovered by distress): "but if the verdict of the jury shall be given for a less sum then shall have been previously offered by the said Company, one moiety of the said *costs and expenses* shall be paid by the party with whom the said Company shall have such controversy or dispute, and the remainder by the Company," &c.

Sect. 84 enacts, "That all parties with whom the said Company shall have any such dispute, and who shall require a jury to be summoned as aforesaid, shall, at their own costs, before the said Company shall be obliged to issue their warrant for the summoning of such jury, enter into a bond, with two sufficient sureties, to the said Company, in a penalty of £100, to prosecute their complaint, and to bear and pay their proportion of the *costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses*, in case any part of such costs and expenses shall fall upon them."

(*a*) November 23rd, 1841, before *Williams*, *Coleridge*, and *Wightman*, Js.

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for which there is no charge, but includes "obtaining," and with that addition the case comes within the decision in *Rex* v. *The Justices of the City of York* (*a*), which case differs from the present only by containing the words "and also of the said inquest." In that case, *Cone* v. *Bowles* (*b*), and *Rex* v. *Glastonby* (*c*) were cited to shew that all statutes that give costs are to be taken strictly. But Lord *Denman*, C. J., said, "The dictum in *Cone* v. *Bowles* is hardly consistent with the principle upon which the Statute of Gloucester (*d*) has been interpreted. It appears to me, that the statute now before us should be liberally construed: the trustees should pay this price for the great power which is given to them." And in the same case, *Taunton*, J., says, "With respect to the costs of surveyors, I should pause before saying that costs are to be allowed for them, *quâ* surveyors; but if they have been witnesses, they will be on the same footing as others." It is not contended here that they are to have their costs unless they were witnesses, but by their plans and measurements, which make them competent to give satisfactory evidence, they come within that limit. In a late act of this Company (*e*), fees to counsel are expressly provided

(*a*) 1 A. & E. 828.

(*b*) 1 Salk. 205.

(*c*) *Cas. Temp. Hard.* 357.

(*d*) 6 Edw. 1, c. 1, which gives "the costs of the writ purchased," held to extend to all the legal costs of the suit. See 2 Inst. 288, (11).

(*e*) 3 Vict. c. li. intituled, "An act to make a further alteration in the line of the Birmingham and Derby Junction Railway, and an approach thereto at Tamworth, and to amend the acts relating to the said railway."

Sect. 29 enacts, "That in all cases where the verdict of the jury summoned, as by the said act (6 W. 4, c. xiv.) directed, shall be given for the same, or a greater sum than shall have been previously offered by the said Company for the purchase of any lands to be used or taken by them, or as compensation for any damage or loss which may happen or arise in the execution of any of the powers thereof, the reasonable fees which may have been paid to counsel for attending the inquiry before such jury by the party with whom the said Company may be in dispute, shall be paid by the said Com-

for, and it was on that account that in this case the sheriff thought he was bound to disallow the costs in question. [*Coleridge*, J.—In *Rex* v. *Gardner* (*a*), the language of the two sections of that act (4 & 5 Will. 4, c. xxv. s. 71 & 72) is the same as the 83rd and 84th of this.] The points upon which that case was pressed upon the Court did not embrace this argument, and Lord *Denman*, C. J., struggled against the injustice caused by that act. Section 71 there, and 83 here, mean something more than they express, and if so, a reasonable construction may be put upon them. The costs of taking a verdict means the costs of those proceedings which end in a verdict being taken. The Court has always repudiated the notion that these private acts are to be construed so strictly against the subject as great public acts.

Whateley, contrà, was stopped by the Court.

WILLIAMS, J.—It might perhaps be successfully contended, that the larger words of the 84th section, as to "the expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses," are, to a certain degree, to be considered as extending the language of the preceding section, wherein "the costs of summoning such jury, and of the expenses of witnesses, and of the bond" only are enumerated; but admitting, for the sake of argument, that such should be deemed an extension of the other section, it

pany; and the amount of such fees shall be settled and determined by the sheriff &c. presiding at the taking of such inquiry, in like manner as the costs of summoning such jury, and other expenses payable by the said Company; but upon the same scale of allowance as may, for the time being, be adopted or allowed by the taxing officers of her Majesty's Courts of Record at Westminster."

(*a*) 6 A. & E. 112.

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seems to me impossible to carry it to the extent contended for in the argument in this case. In this bill are considerable charges for payments made to surveyors, who have been instructed, I presume, to make plans, or something useful for the purposes of the investigation, as those parties do not appear to have been called as witnesses; nor is it pretended that they received this charge *quâ* witnesses, but simply in the character of surveyors, which is not at all within the meaning of the act of Parliament, nor within the language most certainly of the larger and more extended clause. The case of *Rex* v. *Gardner* (*a*) plainly shews, that though the Judges were anxious, if possible, to travel out of the express words of the act, they felt themselves bound by them; and we must act in the same manner. It is sufficient for us to say, that here are some charges allowed which are clearly not within the terms or language of the act of Parliament. The rule must, therefore, be made absolute.

COLERIDGE, J.—If there had been any words in this clause like those which occurred in the case of *Rex* v. *The Justices of the City of York* (*b*), those words would have relieved the case from all difficulty, and we might have adopted the view urged upon us, as the words "costs of the inquest" would have been in common understanding the costs of the inquiry, and that would have let in the general expenses, as in an ordinary case; but there are no such words here. It appears to me that the case of *Rex* v. *Gardner* (*a*) is conclusive, but even if that case had never existed we have merely to deal here, not with the hardship or injustice of the case—not with the mode in which these acts of Parliament are framed—but we have an act before us in which there are but two sections to be

(*a*) 6 A. & E. 112. (*b*) 1 A. & E. 828.

considered, and the simple question is, whether the charges here allowed can fairly come within the words of those sections? It seems to me quite impossible that they can, even taking them as suggested, and which is giving the utmost benefit to the applicant, that is, taking the words of the 84th sect. to be the governing words, and not the more limited words in the 83rd. As to what has been said with reference to instructions to the under-sheriff, it seems to me not to be necessary for us to go further than to say, let him look at sect. 84, and allow such costs as upon any reasonable and liberal interpretation of its language are proper to be allowed.

WIGHTMAN, J.—I am of the same opinion. I cannot distinguish this case, either in principle or the details of it, from the case of *Rex* v. *Gardner* (*a*). The terms of the two acts of Parliament are almost precisely the same.

Rule absolute.

(*a*) 6 A. & E. 112.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1841.

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January 12.

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By a railway act, (6 Will. 4, c.lxxxvii. s.101) it was provided, that proprietors might transfer their shares on certain conditions; that the deed of transfer should be kept by the Company, who were to cause a memorial of such transfer to be entered in a book to be kept for that purpose. Section 96 gave power to make calls, on giving twenty one days notice, and provided, that if any owner or proprietor *for the time being* should not pay his calls, he should be liable to pay interest; and section 98

DEBT for £516, being the amount of two calls of £250 each and interest, on fifty shares in the above Company.—Plea, *nunquàm indebitatus*.

At the trial before *Coleridge*, J., at the sittings at Westminster after *Hilary* Term, 1839, it appeared that notice of the first of the two calls in question was given on the 6th March, 1838, payable on the 9th April, and of the second on the 23rd June, payable on the 28th July. The shares were originally held by a Mr. Mount, and were transferred by him to the defendant by deed dated 7th April. This deed was produced at the trial, and also a book of the Company (kept under the 101st section of the act) for the entry of memorials of transfers, in which book there was a memorial of the above transfer, also dated 7th April. There was no evidence to shew when that entry was made, nor was there any indorsement of the memorial of transfer on the certificate of the shares, under section 101. The minute book of the directors, in which the orders for the

provided, that on the trial it should be only necessary to prove that the defendant, *at the time of making such calls*, was a proprietor.

An action was brought by the Company against the defendant for two calls, notice of the first having been given 6th March, payable 9th April, and of the second 23rd June, payable 28th July. A deed of transfer of the shares from the original holder to the defendant was produced, and the transfer book of the Company, containing a memorial of the transfer, both dated 7th April, but there was no other evidence of the time when the entry was made:—

Held, that the transfer book was admissible, and was reasonable evidence to shew the entry was made when it bore date; and that the defendant, not having been a proprietor till 7th April, after the day when the first call was *made* (not *payable*), was not liable to the first, but only to the second call (*a*).

(*a*) See the judgment of *Parke*, B., in *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock*, antè, p. 530.

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calls were entered, was produced, and also a book in which the names, additions, &c., of the several proprietors of shares were from time to time entered. It was the practice to affix the common seal of the Company to this book at the half-yearly meetings in March and August. This appeared to have been done the 6th March, when it contained the following entry:—

	Proprietors.			*Registered Shares.*		*Subscription; Amount paid.*
Registry.	*Name.*	*Residence.*	*Addition.*	*No. of Shares.*	*Numbered From—to*	*To 6th March, 1838.*
No. 107	Mount, William	Norwood, Surrey	Esquire	50	1984—2033	£50

The seal appeared to have been again affixed to the book on the 30th of August, when it contained the following entry:—

	Proprietors.			*Registered Shares*		*Subscription; Amount paid.*
Registry.	*Name.*	*Residence.*	*Addition.*	*No. of Shares.*	*Numbered From—to*	*To 30th Aug. 1838.*
No. 54	Thompson, Charles	Peckham	Esquire	50	1984—2033	£100.

On the part of the defendant a nonsuit was applied for, on the ground that there was no evidence to shew him a proprietor: that the book was not evidence; or, if it was, that it only proved him to be a proprietor on the 30th August, after the last call was made and payable. That the interest of Mount (the assignor) was not shewn; and that there was no evidence to shew when the entry, dated 7th April, was made in the transfer book, or the memorial of transfer indorsed on the deed; and that, at all events, the defendant could only be liable for the call made after that day. A verdict was found for the plaintiffs for the whole amount, leave being given to the de-

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fendant to move to enter a nonsuit on the above grounds, or to reduce the damages to £250, the amount of the first call, and interest; and *Kelly*, in *Easter* Term, 1839, having obtained a rule *nisi* accordingly (*a*),

(*a*) By the 6th Will. 4, c. lxxxvii. s. 91, it is enacted, "That the said Company shall, and they are hereby required, at their first or some subsequent general meeting, and afterwards from time to time, as occasion may require, to cause the names of the several corporations, and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and, after such entry made, to cause their common seal to be affixed thereto."

Section 93, "That the said Company shall, in some proper book to be provided by the said Company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to any share therein; and every proprietor of the said undertaking, &c. may, at all convenient times, have recourse to and peruse such book."

Section 95 enacts, "That the several parties who have subscribed, or shall hereafter subscribe for or towards the said undertaking, shall, and they are hereby required to pay the sums of money by them respectively subscribed for, or such parts or proportions thereof as shall from time to time be called for by the directors of the said Company, under and by virtue of the powers of this act, at such times, and at such places, and to such persons, as shall be directed by the said directors; and in case any party shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same in any Court of law or equity, together with interest on such unpaid sum of money, at the rate of £5 per cent. per annum, from the time when the same was directed to be paid, up to the day of actual payment."

Section 96. "That the said directors shall have power, from time to time, to make such calls of money from the subscribers to, and proprietors of the said undertaking *for the time being*, to defray the expenses of, and to carry on the same, as they from time to time shall find necessary, so that the aggregate amount of calls made, or money paid for or in respect of any such shares, shall not amount to more than the sum of £20 on any such share, and so that no such call shall exceed the sum of £5 upon

Sir *W. W. Follett, Crowder,* and *M. Smith,* shewed cause (*a*). The first objection is, that the book of proprietors was not

each share which any person or corporation shall be possessed of or entitled unto in the said undertaking; and an interval of three calendar months at the least shall elapse between the day appointed for payment of one call and the day appointed for payment of another call, and twenty-one days' notice at the least shall be given of every such call, (by advertisement in certain newspapers); and all monies so called for shall be paid to such persons, at such times and places, and in such manner as in the said notice shall be appointed, and the respective owners of shares in the said undertaking shall pay their rateable proportion of the money to be called for as aforesaid, to such persons, and at such times and places, and and in such manner as shall be appointed as aforesaid; and if any owner or proprietor for the time being of any such share shall not so pay such his rateable proportion, then and in such case, and as often as the same shall happen, he shall pay interest for the same after the rate of £5 per centum per annum, from the day appointed for the payment thereof up to the time when the same shall be actually paid; and if any owner or proprietor for the time being of any such share shall neglect or refuse to pay such his rateable proportion, together with interest, if any, then, or at any time thereafter, it shall be lawful for the said Company to sue for and recover the same in any of his Majesty's Courts of Record, by action of debt, or on the case, or by bill, suit, or information; or the said directors may, and they are hereby authorized to declare the shares belonging to such owner to be forfeited, and to order such shares to be sold."

Section 98. "That in any action to be brought by the said Company against any proprietor *for the time being* of any share in the said undertaking, to recover any money due and payable for or in respect of any call, it shall be sufficient for the said Company to declare and allege, that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in such sum of money as the calls in arrear shall amount to, for a call, or so many calls, of such sums of money upon a share belonging to the said defendant, whereby an action hath accrued to the said Company by virtue of this act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such

(*a*) November 17th, before Lord *Denman*, C. J., *Littledale, Williams,* and *Coleridge,* Js.

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receivable in evidence, on the ground that the date in the book is later than the last call. The book mentioned in

call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever; and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid, upon such call, unless it shall appear that any such call exceeded £5 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required; and in order to prove that the defendant was a proprietor of such share in the said undertaking, as alleged, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein."

Section 101. "That it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein mentioned; and the conveyance of such shares shall be by writing, duly stamped, and may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties as the case may require; (that is to say, &c.) And on every sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or by the secretary or clerk of the said Company, who shall enter in some book, to be kept for that purpose, a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which entry and indorsement the sum of 2*s.* 6*d.*, and no more, shall be paid to the said Company; and the said Company, or the secretary or clerk as aforesaid, is hereby required to make such entry or memorial accordingly, and, on demand, to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security; and such indorsement, being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and, until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser

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section 98 is the book in section 91; the latter points out how it is to be kept, and the former makes it evidence. It is the book in which all the entries are made; and although by section 91 that is done at the time of their becoming proprietors, the statute requires that, to authenticate the book, the seal must be affixed. That is done twice a-year, and was done on the 30th of August; and in that book the defendant's name appears. Of course, that book alone, when produced, with the seal of the 9th of August, is only evidence of his being a proprietor on that day. Then, in order to fix the date of his becoming a proprietor, a transfer, dated April 7th, has been proved from Mount to him, which is *primâ facie* evidence. [*Coleridge*, J.—One objection was, that there was no evidence of Mount being a proprietor]. Here is a deed under his hand and seal, which supposes every thing done under that transfer by his own acknowledgment. It is then said, that if that be so, there is no evidence of the entry of the memorial of the transfer. This book shews the transfer was made on the 7th of April; if that was not true, the defendant might have shewn it: it must have been taken to the office, either by him or Mount. It being the duty of the Company to make the entry, and an entry of the 7th of April being shewn, and a deed produced of that date, it lies with him to prove the contrary; that is all that the act requires the Company to do. The date of bills of exchange and such instruments are *primâ facie* taken to be the real date, unless shewn to the contrary.

shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking."

Section 102. "That no person or corporation shall sell or transfer any share which he or they shall possess in the said undertaking, upon which any call shall have been made, after the day appointed for the payment of the same, unless, at the time of such sale or transfer, he or they shall have paid the full sum of money which shall have been called for in respect of each share."

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So in deeds. As to the indorsement of the memorial, the enactment is only directory; *The Southampton Dock Company* v. *Richards* (*a*). And the latter part of the clause shews that it is not essential to make a party liable. It is intended for the benefit of the defendant, and does not affect the right of either party, and is only to be done on demand. Then for what is he liable? He was a proprietor on the 7th of April. Notice of the first call was given on the 6th of March for the 9th of April, and notice to the original holder is good to the proprietor at the time of payment. The call is the day of payment, and twenty-one days' notice is to be given of that day to any *owner or proprietor*; not to one who transfers during the twenty-one days, for he would have no shares to forfeit. Section 102 sets any doubt at rest. There can be no transfer after the day of payment, unless the call be paid; but there is no restriction after the day of notice. As to the instrument of transfer, common law proof is not excluded: and a verbal contract has been held sufficient to pass the property in these shares: *Bradley* v. *Holdsworth* (*b*).

Kelly, contrà.—The book only proves the defendant a proprietor in August, after the making of both calls. The deed of transfer does not prove him one. The objection in *The Southampton Dock Company* v. *Richards* (*a*) was, that the book contained entries not according to the statute; but here there is no evidence that the book was kept by the proper persons, and in a manner to make it the book pointed out by the statute, or that the common seal was affixed after the entries were made,—it might have been made up the day before the trial. There being no proof of the time when that was done, it is not admissible. As to the transfer, it would not have entitled the defendant to any advantage, or be evidence in an action against the Com-

(*a*) Antè, p. 215. (*b*) 3 M. & W. 422.

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pany, and why should they use it against him? It is not like the case of lessor and lessee, where the title cannot be disputed; even if they were parties to the deed, he would be estopped, but they are strangers to it altogether. This is a matter exclusively within the knowledge of the plaintiff. Mount could only have become proprietor by the original deed, or by taking from an original proprietor. Section 101 says, you may acquire by transfer, but only from shareholders; it is not enough, therefore, to shew a transfer in fact, but one from a proprietor. Then the provision is express, that the seller alone shall remain liable till the memorial is made either by the Company or their secretary: they must shew that done as a condition precedent to make parties liable. Many other consequences follow besides liability; a purchaser has no vote, nor right to profits. The first question is, whether an entry made by the plaintiffs in a book of their own is proof of its having been made at the time it purports. The legislature has given every facility to these Companies to shew the defendant a proprietor; they have only to prove two things, which they have not done in this case, first the entry made, and secondly the time of making, which is of the very essence of the proceeding. As to the last point, it is only necessary to look at section 98 to shew that the defendant is not liable to the first call. He did not become a proprietor till the 7th of April, and cannot be made liable for a call made in the preceding month. That section provides, that "it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor." Then what is the meaning of *making* a call? not the paying it, but the act of the 9th of March. The plaintiffs prove a resolution of the directors of that day, which made the call, though it provided for the payment on another day: no act was done in April, and the statute itself, in section 96, provides that notice of the call (which must refer to a call *having been made*) must be given

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in the newspapers. It is impossible, without committing a violence to language, to give any other meaning to these words, and the defendant can only be liable to the last call, if to either.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

In the argument on this case two points not disposed of by the decision in the Court of Exchequer (*a*) were made by the defendant: the first that there was no evidence to shew him a proprietor at any time; the second, that at all events he was only liable for the last of the two calls for which the action was brought.

The evidence by which the defendant was ultimately shewn to be a proprietor, was the production of the transfer deed to himself, the execution of which by himself he had admitted. By the 101st section of the act, this deed is to be kept by the Company, and was produced by them at the trial; it bore date the 7th April. The same section enacts, that a memorial of such transfer shall also be made and kept by the Company, and, until that be done, the seller is to remain liable for future calls, and the purchasers have no part or share in the profits of the undertaking. The memorial book was produced, in which appeared an entry of this transfer, dated also the 7th of April. The secretary of the Company had been excluded from giving evidence, on an objection to his competency as being a shareholder; and then it was sought to exclude the book also, for want of proof by whom, and how it was made up, and at what time the entry in question had been written therein. We think, however, that it was rightly admitted, and that there was reasonable evidence that the entry was

(*a*) *The London Grand Junction Railway Company* v. *Freeman*, antè, p. 468.

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made on the 7th April, the day on which it bore date. The defendant, being the transferee of the shares, must be taken to have brought the deed to the office where it was found, and that for his own purpose, to procure the memorial to be made, without which it would pass no interest to him. The Company would be in some sort his agents in making the memorial,—he would be interested in seeing that it was correctly made; and, besides this, the officer of the Company (the secretary or clerk) has, by the act, a public duty cast on him of making these entries. On these grounds, first, as against the defendant, and, secondly, on the ordinary presumption that a public officer performs his duty correctly, it seems to us that it was rightly taken that the memorial was made correctly, and on the 7th April, when it professed to be. This, however, only fixed the defendant as a proprietor on and from that day; the first call for which the action was brought was made on the 6th March, and was payable on the 9th April, which raised the question whether the defendant was liable to be sued for it. The plaintiffs contended, that the owner of the share, at the time when the call became payable, was bound to pay it, and they relied on the language of the 96th and 102nd sects. for this purpose; the first of these is not carefully worded, it seems not to have contemplated the case of a transfer between the day of making the call and its payment. It begins with enabling the directors to make calls *from the proprietors for the time being*; then enacts, that if any proprietor *for the time being* of any share shall not pay such his rateable proportion, he shall be liable to pay interest, and then or any time thereafter it may be sued for, or the directors may declare the shares forfeited, and order them to be sold. It is certainly not possible to apply *all* these provisions to the case of one who by transfer of his shares has ceased to be a proprietor, for there is no restraint on the transfer of shares between the

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making of a call and its becoming payable; and the Company could not, we think, after having sanctioned a transfer, by accepting and memorialing the deed, pursue the share, and declare it forfeited in the hands of the transferee, for the fault of the transferer. Yet the words of the clause are precise, *that the calls are to be made from the proprietor for the time being*, and the same persons, on whom the calls were made, seem contemplated all through the section as being those who are to pay, and *who may be sued for non-payment*.

This last is the point on which the present question turns, and whatever doubt the 96th sect. might leave on our minds, the 98th sect., which is addressed expressly to this point, is free from ambiguity: it provides the form of declaration, and specifies the necessary evidence to support it, as to which it uses the following language:—"On the trial it shall only be necessary to prove that the defendant at the time of *making* such call was a proprietor," &c. Construing, therefore, the 96th by the 98th sect., it seems clear that the Company can only *sue* the party who was a shareholder when the call was made; and it may be, that, in the case of a transfer before the day appointed for payment, the remedy by forfeiture may be wholly lost.

The plaintiffs relied on the 102nd sect., which prevents any transfer *after* the call is payable, and before payment made; there is no such prohibition before the call is payable, but the absence of it throws no conclusive light on the legal consequence of a transfer so made. This section, however, shews that the statute distinguishes clearly between the day of *making* the call and the day of *payment*, and destroys the argument, that the call might be considered, under the 96th and 98th sects., as made on the day when it was to be paid.

We are of opinion, therefore, that the rule should be

absolute, for reducing the damages by the amount of the first call and interest, and discharged as to the residue.

Rule accordingly (*a*).

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(*a*) See the next case.

COURT OF COMMON PLEAS.

In Trinity Term, 1842.

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DEBT. The declaration stated, that the defendant heretofore, and before the commencement of this suit, to wit,

By a railway act (6 W. 4, c. lxxxvii.) the Company are authorized (s. 95) to sue *subscribers* who neglect to pay the calls on their shares. Sect. 96 empowers the directors to make calls of money from the *subscribers* and *proprietors for the time being*, and, in default of payment, to sue for the calls or to declare the shares forfeited. Sect. 98 provides, that in an action against such proprietor for the time being, it shall be sufficient to declare that the defendant being a proprietor of a share is indebted in £— for a call, whereby an action hath accrued to the Company, without setting forth the special matter; and sufficient to prove that the defendant at the time of making such call was a proprietor of a share, and that the call was made, and notice given as directed by the act. Sect. 101 enables proprietors to sell their shares; providing that on every such sale the deed or conveyance executed by the seller and purchaser shall be kept by the Company, who shall enter in a book a memorial of the transfer, and indorse the entry thereof on the deed, and on the certificate of the share sold: and until such memorial shall have been made and entered, the seller shall remain liable for calls, and the purchaser shall have no part of the profits, nor interest paid, nor vote in respect of such share. Sect. 102 prohibits the sale by any person of any share on which a call shall have been made, *after the day appointed for payment of the same*, unless at the time of such sale he shall have paid the full sum called for in respect thereof.

In an action for calls, the declaration stated, that the defendant, having before the commencement of the suit been a proprietor of shares, was and still is indebted to the Company for a call on each of such shares, and that by reason of the calls remaining unpaid an action had accrued to the plaintiffs. Plea—That the call was made payable on ——, and that the defendant transferred his shares by deed to one C. T., and that the Company entered a memorial of the transfer, according to the provisions of the act, before the call was payable. Verification. On special demurrer to this plea:—

Held, that no right of action for a call is given by the act, or exists independently of it, against a party (not appearing to be an original subscriber) who had held a share at the time a call was made, but who had transferred and entered a memorial of his transfer before the call was payable; and that the duty to pay a call in such case does not arise until the day appointed by the directors for payment.

Held also, that supposing the declaration did shew a cause of action, it was well answered by the plea, which was good in substance and in form, and properly concluded with a verification.

Semble, that there are only three cases in which an action for calls can be maintained under the act. 1. Against *a subscriber*, under sect. 95. 2. Against *an owner for the time being*, under sect. 96. 3. Against a party who having transferred his shares is no longer a shareholder, but whose liability is continued by sect. 101, no memorial of transfer having been entered.

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on the 6th March, 1838, being the proprietor of divers, to wit, fifty shares in a certain undertaking, &c., was indebted to the said Company in £250, for a call of £5 upon each of the said shares, whereby, and by reason of the said sum of £250 being and remaining wholly unpaid, the defendant still is indebted to the plaintiffs in the same, and an action hath accrued, &c.

Plea—That true it is heretofore and before the commencement of this suit, to wit, on the said 6th of March, in the declaration mentioned, the defendant was the proprietor of the shares in the undertaking in the declaration mentioned; that the call in the declaration mentioned was made under and pursuant to the provisions of the said act, for an instalment of £5 per share, to be paid by the proprietors or owners of the capital of the Company, on or before the 9th day of April then next ensuing; but that afterwards, and before the commencement of this action, and before the said 9th of April hereinbefore mentioned, when the call was payable as aforesaid, to wit, on the 7th April, 1838, he, the defendant, being such proprietor as aforesaid, then sold and disposed of all his shares in the undertaking (the said shares being the same shares in respect of which the plaintiffs claim to be paid the said call) to one Charles Thompson, and the said C. T. then took and accepted the same; and the defendant then, to wit, on the said 7th of April, 1838, after the call was made, and before the same was due or payable, by a deed under the seal of the defendant, and also under the seal of C. T., (and which deed is now in the possession of the plaintiffs, and the defendant is therefore unable to bring the same into Court here), in consideration of the sum of £5 paid to the defendant by C. T., did assign and transfer to C. T. the shares in the declaration mentioned, to hold to C. T., his executors, administrators, and assigns, subject to the several conditions on which the defendant held the same immediately before the execution thereof; and C. T. there-

by then agreed to accept and take the shares, subject to the conditions aforesaid, (as by the said deed, reference &c.). That the deed was duly stamped before the same was executed by either party, and made and executed according to the provisions of the act. That he, the defendant, and C. T. then duly delivered the said conveyance (the same, then and before the call was payable, being first duly executed by both the defendant and C. T.) to the Company, to be kept by the Company, according to the provisions of the act, and then requested the Company to enter in the Company's book, kept for that purpose, a memorial of the transfer and sale, and to indorse the entry of the memorial on the conveyance or transfer, which memorial and indorsement the Company then, and before the said call was payable, made according to the act; and thereupon, and before the call became due and payable, to wit, on the 7th of April, the Company duly received the conveyance on behalf of the Company, the plaintiffs in this action, and then duly entered the memorial in the Company's book, and then duly endorsed the entry of the memorial on the conveyance or transfer, according to the said act, and then accepted and received the transfer of the shares of the defendant to C. T., whereby the defendant then, and before the commencement of this action, and before the call became due and payable, ceased to be the proprietor and owner of the shares, and then ceased to be liable to the call, under and by virtue of the provisions of the said act in the declaration mentioned: Verification.

Demurrer, — for that the plea does not traverse, or confess and avoid the cause of action stated in the declaration, or that the defendant was indebted as therein alleged; that if the plea is pleaded by way of traverse, then that the same is an argumentative, and not a direct denial of the matters charged in the declaration; and the same improperly concludes with a verification, in stead of to the country; and for that the plea amounts

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to a plea that the defendant never was indebted as in the declaration alleged, and should have been so pleaded; and for that if the plea is intended to be pleaded by way of confession and avoidance, then that the same does not sufficiently or at all confess that the defendant ever became or was indebted as in the declaration alleged; or, if it does sufficiently confess such liability, shews no matter by which the same has been discharged; and for that the plea does not aver or shew that C. T. ever became liable to pay the call; and for that the plea does not sufficiently admit or deny that the defendant was a proprietor of the shares in the declaration mentioned, or a subscriber to the undertaking at the time the call was made, or that due notice was given of the making of the call as required by the act, or that the defendant ever became or was liable to pay the same call, or indebted to the plaintiffs as in the declaration alleged; and for that the plea is wholly immaterial, and admits the cause of action stated in the declaration, and no single, certain, or material issue can be taken thereon; and for that the plea is in other respects uncertain, informal, and insufficient.—Joinder.

The defendant's points were, that the declaration should have averred that he is still the proprietor of the shares, and is bad in substance for not doing so; and, also, that his plea is a sufficient answer in substance and in form (*a*).

Channell, Serjt., (*Bovill* with him), in support of the demurrer (*b*).—The main question is, whether the defendant, having disposed of his shares after the call was made, but before it became payable, and the transfer having been recognised by the Company, was liable to pay the call, or that

(*a*) All the sections of the act referred to in this case are set out in *The Aylesbury Railway Co.* v. *Thompson*, antè, p. 668.

(*b*) November 12, 1841, before *Tindal*, C. J., *Erskine*, *Coltman*, and *Maule*, Js.

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the remedy of the Company was lost; it having been held by the Court of Queen's Bench, in *The Aylesbury Railway Company* v. *Thompson* (*a*), that no action was maintainable against the transferee. It could not there be denied, that the defendant had shewn in his plea sufficient to discharge him from liability, and that the transfer of his shares to Thompson was a valid one; but it was contended, that he could not divest himself of the liability to the call made before that transfer, which attached to the proprietor at the time the call was made. The 96th sect. enables the Company to make such calls from the subscribers to and proprietors of the undertaking for the time being as they should deem requisite; and those words "for the time being" coupled with the rest of the clause, shew the clear intention of the legislature to render the holder of the shares at the time of the call being *made* (not *payable*) liable for the amount of them. Sect. 98 introduces the same words, in connection with the same subject; and if any doubt could arise upon this interpretation of the words of the act, it is clearly set at rest by the remainder of that section, which declares, that on the trial of any action for the recovery of calls, it shall only be necessary to prove that the defendant, *at the time of making such respective calls*, was a proprietor of a share in the undertaking, &c. There might be some little difficulty as to the words of sect. 101, enabling proprietors to sell shares; but upon examination it will appear that they are in furtherance of the other enactments. That section provides, that shares shall be sold, "subject to the rules and conditions herein mentioned." There is no *condition* which makes the purchaser of shares subject to the liabilities of the preceding shareholder: and this expression must, therefore, be taken to refer only to the general rules of the Company. Sect. 102 carries the point a step further; it

(*a*) Antè, p. 668.

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enacts that no shares shall be sold after a call is made, until it is paid. That seems clearly to shew the liability of the defendant in this action. See the judgment of Lord *Denman*, C. J., in *The Aylesbury Railway Company* v. *Thompson* (*a*), where his Lordship says, "It may be, that in the case of a transfer before the day appointed for payment, the remedy by forfeiture (under sect. 96) may be wholly lost."

Secondly, this plea is informal. The declaration being in the form given by the act, must be taken to contain impliedly all the allegations necessary to sustain the cause of action; and, therefore, that the defendant was a proprietor of shares at the time of the call becoming due, if that is necessary to be shewn. The plea of *nunquàm indebitatus* would have put in issue this allegation, as in the case of *The Edinburgh, Leith, and Newhaven Railway Company* v. *Hebblewhite* (*b*), (where the plea denied notice of the calls, pursuant to the act, and concluded with a verification,) it was held that the allegation of notice being a fact necessary to be proved in order to entitle the plaintiff to recover, must be taken to be impliedly contained in the declaration; and, therefore, that the plea ought to have concluded to the country, and was bad on special demurrer. It seems also from that case, that a plea of *nunquàm indebitatus* would have sufficiently put in issue all the matters required by the act to be proved in support of the action.

But this plea is also bad in confession and avoidance. It ought to have admitted the defendant's liability, which it does not, and then have shewn how that liability was discharged; whereas it sought to shew that the defendant had never been liable. Or, if it was a good plea in confession, it did not sufficiently avoid the admitted liability, because it did not properly allege the liability of Thompson.

(*a*) Antè, p. 668. (*b*) Antè, p. 237.

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Stephen, Serjt., for the defendant.—If the plea is in substance sufficient, the declaration is bad for not alleging that, at the time of the action being brought, the defendant was a proprietor of shares. The plea is sufficient, and the judgment of the Court of Queen's Bench, in *The Aylesbury Railway Company* v. *Thompson* (*a*), shews that this is a *casus omissus*, and that the plaintiffs, if they had no remedy against Thompson, have none at all. [*Tindal*, C. J.—If that be so, what consequence would follow? Every proprietor, just as the calls became due, might transfer his shares. Such an argument is the last course the Court would adopt]. The Court must not only look at the hardship likely to be produced to the Company by such a decision, but also at the position in which a contrary one would place the defendant. It is not because the Court of Queen's Bench have said that Thompson is not liable that this Court would hold the transferer to be bound to pay the demand. By their action against Thompson the Company have shewn what their opinion was of the liability; and if such was the impression on their minds, the bargain with Thompson may surely be considered to have been made on the same understanding, —that, in parting with his shares, the defendant also transferred his liability on them. As to the sections of the act, the proper construction of them is, that the holder of shares at the time of a call becoming due is liable to the payment of the call. Such a construction is the probable one to be entertained by the legislature, and is not in contravention of the decision of the Court of Queen's Bench. That decision shews that there is nothing in the act to prevent the holder of shares from transferring them after a call is made, and before it becomes due. The holder at the time of the call being due would, in the ordinary view of the legislature, be the person liable, on the pre-

(*a*) Antè, p. 675.

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sumption that the possessor of shares possessed also the means of answering the calls. The act, therefore, in speaking of the "owner for the time being," must be taken to mean the owner at the time of the call becoming payable, who is clearly the person contemplated by sect. 96, which enables the directors to declare the shares forfeited. The enactments of sect. 98, "that in any action for calls, it shall only be necessary to prove that the defendant, at the time of making such call, was a proprietor of a share," do not negative those of sect. 96; and may be considered as directory only, pointing out such evidence as is absolutely necessary, so as to discharge the Company from proving many preliminary facts, which would otherwise be necessary; not as enacting the liability of any particular party. Sect. 101 provides for the sale of shares in the undertaking, only to be effected subject to the rules and conditions mentioned in the act, one of which conditions was intended to be, that the transferer was liable to any call made before the sale, and not satisfied. But this clause must be taken to mean, that the sale of the shares carried with it all the liabilities already attaching to them. But the 102nd sect. is still plainer—it provides, that no share shall be sold, on which any call shall have been made, after the day of payment, until the amount called for shall have been paid. This implies, that a share may be sold between the days of making and payment of the call; if not, the legislature would have taken care to frame this section so as to meet the difficulty. But, looking at the various sections, the statute evidently contemplates the fact of the defendant being a proprietor; that is, contemplates the liability only of the actual holder of the shares at the time of the call becoming due. This also supports the objection to the declaration. The 98th sect., which gives the form, enacts, that the facts therein required to be proved, shall be *primâ facie* evidence that such defendant *is* a proprietor;

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that is, it specifically requires the declaration to be so framed as to tally with the argument now contended for. The objection to the plea only amounts to this, that, instead of the special plea, a plea of *nunquàm indebitatus* only should be pleaded. But, under that plea, the special matters of this defence could not be given in evidence. That plea is given by R. G. H. T., 4 Will. 4, s. 2, c. 3, and would only bring in issue such matters as constitute non-liability. The declaration states the defendant had been a proprietor; the plea admits that he had been so once, but had ceased to be so before the call became due. This could not be raised by the general issue. It is, however, a plea in confession and avoidance; that is, it does not confess a liability, because the defendant contends he never was liable, but it confesses the facts stated, and avoids the legal effect of them. The case of *The Edinburgh, Leith, and Newhaven Railway Company* v. *Hebblewhite* (*a*) does not apply here, the real question there being, whether a plea of no notice should conclude with a verification or to the country.

Channell, Serjt., in reply.—The argument that the Company originally believed Thompson to be liable for their calls amounts to nothing, for an action was brought against him in respect of other liabilities also. The 98th sect. is not merely directory—it refers not only to matter of evidence, but the general scope and meaning of the statute; because, in framing so important a clause, the legislature would have taken care to avoid the expressions used, unless they were intended to convey the meaning contended for by the plaintiffs. The remedy by forfeiture might produce some doubt, but that must also be taken with the other enactments of the statute. The declaration, therefore, is good, and the defendant has failed to shew

(*a*) Antè, p. 237.

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the plea good. He must either shew he never was indebted, in which case he should have pleaded *nunquàm indebitatus*, or, if he plead in confession and avoidance, he must say there was a time when he was indebted, which could only be by admitting the construction put upon the act by the plaintiffs, and that his liability had been since avoided or discharged. He has done neither of these things, and the plaintiffs are therefore entitled to judgment.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the Court. This is an action of debt brought by the Aylesbury Railway Company against William Mount, for a call upon certain shares in that Company. The declaration in substance states, that the defendant having before the commencement of the suit been a proprietor of shares, was and still is indebted to the Company for a call on each of his shares, and that by reason of the calls remaining unpaid an action has accrued to the plaintiffs. The plea states that the call was made payable on the 9th of April, and that the defendant transferred his shares by deed to one Charles Thompson, and that the Company entered a memorial of the transfer according to the provisions of the act before the call was payable. To this plea there is a demurrer, and the substantial question is, whether an action for a call can be maintained against a proprietor, who does not appear to have been an original subscriber, and who has transferred his shares, after an instalment of the subscription has been called for by the directors, and before the time appointed for payment of it.

It is clear that, at common law, *i. e.*, independently of the railway act, the matters stated in the declaration do not shew a cause of action; it is therefore necessary to consider whether the act gives any right of action under the

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circumstances disclosed in the declaration. The act in question is the 6 Will. 4, c. lxxxvii. for making the railway therein mentioned, and it is obvious that the present question must be determined solely by reference to the clauses of that act which bear upon it.

The proprietors of shares (not being subscribers, whose case is provided for under sect. 95) are made liable by sect. 96, which provides that the owners of shares shall pay the calls at the time appointed, and that if any owner for the time being shall refuse to pay, he may be sued, or his share forfeited. It is clear that a remedy by forfeiture is a remedy against the owner *for the time being*, and is wholly inoperative against a person who has transferred his share; *the time being* must, therefore, in this place, as far as forfeiture is concerned, mean the time at which the call was payable, for it is at that time that the default on which the forfeiture accrues takes place, and the right to sue is clearly given against the same owner for the same time being. This 96th sect., therefore, which is the only section that gives an action against a shareholder, gives it in express terms against owners for the time being, and does not give it against any other description of persons. Sect. 90, which provides that no dividend shall be paid on any share after a call shall be made, unless it shall have been paid, confirms this view of the effect of sect. 96. For as sect. 101 enables shareholders to transfer without limitation as to time, and sect. 102 prohibits sales only after the day of payment of a call, unless it be paid, it is clear that a sale may lawfully be made, and the Company be required to enter a memorial of such sale, after a call has been advertised, and before the day for payment has arrived; and sect. 90, by giving a remedy against the owner under the transfer, clearly assumes that he, and not the party who has transferred, and who has ceased to have any right to the dividends, is to be considered as the party to pay the call. In addition to these considerations, it may

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be observed that, though sect. 98 does not prohibit actions other than such as are within its provisions, and though, if a clear right of action were given by some other part of the act against owners other than those for the time being, it would not be taken away by this section, yet its provisions go far to shew that an action against a shareholder, who had ceased to be an owner when the right of action arose, was not in the contemplation of the legislature. This section is applicable in terms only *to any action against any proprietor for the time being*; the form of declaration given by this section is, that the defendant *being a proprietor, is indebted* to the Company for a call upon a share belonging to the defendant. The case of a sale between the notice to pay an instalment and the day for payment is one so obviously likely to be of frequent occurrence, that it is probable that a form of proceeding applicable to such a case would have been provided, if it were intended that in such case the action should be against the former owner; and a similar, or stronger remark arises from the absence of any express provision for a continuing liability, if it were intended to exist. The provision in sect. 101, that the seller should continue liable till a memorial of the transfer is entered, and that in sect. 102, prohibiting a transfer after a call is payable, seem to shew that, if any further liability on a shareholder who had transferred, or any further restraint or alienation had been intended, it would have been expressly provided.

We are aware that, in an action brought by *The Aylesbury Railway Company* v. *Thompson* (*a*), (the party to whom the present defendant had transferred a share after a call made and before it was payable), the Court of Queen's Bench held that the defendant was not liable to pay the call, on the ground that the plaintiffs had not complied with the clause in sect. 98, which provides, "that on the

(*a*) Antè, p. 668.

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trial of such action (*i. e.*, against a proprietor for the time being) it shall only be necessary to prove that the defendant, at the time of making such respective calls, was a proprietor of a share in the said undertaking, and that such call was in fact made, and that such notice was given as is directed by this act, without proving the appointment of the directors who made such calls, or any other matter whatsoever, and the said Company shall thereupon be entitled to recover what shall appear due, including interest computed as aforesaid, on such calls, unless it shall appear that any such call exceeded £5 per share, or was made payable before the expiration of three calendar months from the day appointed for payment of the last preceding call, or that notice was not given as hereinbefore required." The Court of Queen's Bench appears to have considered that this clause restricted the plaintiffs from recovering, unless they gave such proof as is mentioned therein. It was not necessary for that Court to decide whether an action would lie against a party situated as the present defendant is, nor did they decide that it was not necessary to *allege* and *prove* (if it were denied) as well that the defendant was a proprietor at the time of the action brought as at the time of the call. The 98th sect., indeed, applies in terms only *to actions against a proprietor for the time being:* it assumes that it is established that the defendant is such a proprietor, and then makes the provision relied on by the Court of Queen's Bench, viz., "on the trial of such action it shall only be necessary to prove, &c." In order that it may appear to be *such action*, the declaration is required to allege that the defendant, "*being* a proprietor, *is* indebted;" if that allegation is admitted, the admission shews it to be *such action;* if it be denied, the section, immediately after the clause in question, goes on to give a mode of proving it, in these words, viz., "and in order to prove that the defendant was a proprietor of a share in such undertaking, *as alleged*, the production of

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the book shall be *primâ facie* evidence," &c. This Court is not called on to say whether the decision of the Court of Queen's Bench is correct or not; it is sufficient that it appears to us that no right of action for a call is given by the act, or exists independently of it, against a party who has held a share at the time the call was made, (not appearing to be an original subscriber), but who had transferred and entered a memorial of his transfer before the call was payable.

It is clear that the declaration in the present case is not in the form given in sect. 98 of the railway act; for, to be within that section, it should allege that the defendant, *being a proprietor of a share, is indebted* to the Company; and there is no allegation in this declaration, that the defendant being a proprietor is indebted. But as it might be that a right of action might be given by some other part of the act in a case such as that stated in this declaration, it was necessary to consider whether such right of action were in fact given. And it appears to us, on a review of all the material provisions of the act, that there are not more than three cases, if indeed there be so many, in which an action for calls can be maintained; and these are—first, against a party who is owner for the time being, under sect. 96; secondly, against a party who was a subscriber, under sect. 95; or thirdly, against a party who having transferred his shares is no longer a shareholder, but whose liability is continued by sect. 101, in consequence of no memorial of the transfer having been entered. It is clear that the present declaration does not state either the first or the second of these cases, as it does not allege the defendant to be a proprietor or a subscriber; but it may be contended that it substantially shews a case of the third description, and must be taken, not being demurred to, to insist on the right which, under sect. 101, may exist against a former shareholder. Probably, upon the true construction of the act, such a person ought to be treated as an actual

shareholder; but supposing this to be otherwise, and that the declaration is to be considered as shewing a cause of action, it is well answered by the plea, which on this supposition is good in substance, because it shews that the defendant, having transferred his shares and entered a memorial of the transfer before the call was payable, is not liable; and good in form, because it admits all the matters of fact stated in the declaration, (which are only, that the defendant was a proprietor, that a call was made, and that it remains unpaid), and by introducing affirmative matter not inconsistent with those facts, shews that, notwithstanding those facts, the defendant is not liable; it confesses and avoids the matters of fact stated in the declaration, and properly concludes with a verification, and not to the country.

It may be suggested, that a party who becomes a shareholder, at once becomes liable to pay all the unpaid instalments that may be called for by the directors, and that consequently when an instalment is called for, it is *debitum in præsenti, solvendum in futuro;* and that the shareholder at the time the call was made, being the debtor, should therefore be the party to pay; but the general scope of the act is to treat a shareholder (at least one who takes by transfer, and is not an original subscriber) as identified with his share, and as having nothing to do with the Company, either with respect to rights or liabilities, before he becomes, or after he ceases to be a shareholder; the express provisions of the act, giving remedies by action, by forfeiture, and by withholding dividends, against those who held the shares at the time the call was payable, and the absence of any express provision continuing the liability of a shareholder, of whose transfer a memorial is entered, shew that the act considers the debt as not arising till the day appointed for payment. The duty of a shareholder, who takes by transfer, to pay a call, is the creature of the act: the act requires the payment to be made at the time appointed by the directors; at that time, and not before,

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the duty arises; and it is a duty which, by the terms of the act, is cast upon the owner for the time being.

On the whole, therefore, we think that this action cannot be maintained, and that the judgment ought to be for the defendant.

Judgment for the defendant.

COURT OF QUEEN'S BENCH.

Sittings after Trinity Term, 1841.

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June 14. THE QUEEN *v.* THE BIRMINGHAM AND GLOUCESTER RAILWAY COMPANY.

By a Railway act (6 Will. 4, c. xiv. s. 29) a Company were empowered, subject to the provisions and restrictions of the said act, to make or construct, upon, across, under, or over the railway, such roads as the said Company should think proper.

By sect. 41, when any part of any road, either public or private, should be cut through, raised, sunk, taken, or so much injured by the Company as to be impassable or inconvenient, the Company, before any such road should be so cut through, raised, &c., were to cause another road to be set out and made instead thereof, as convenient as the said road so cut through, raised, &c., or as near thereto as might be; and where the road cut through, raised, &c. should be a turnpike road, the substituted road, if temporary, was to be set out and made, and the principal road restored within six months after commencing the operation.

By sect. 47, where any bridge should be erected for carrying any turnpike road, public highway, or occupation road over the railway, the road over such bridge was not to be less than fifteen feet.

IN *Michaelmas Term*, 1839, Sir *J. Campbell*, Attorney-General, obtained a rule *nisi* for a *mandamus* to the

A *mandamus*, reciting that the Company had, in November, 1838, (after the compulsory powers given to the Company for taking land had expired), cut through and taken part of a turnpike road, 40 feet wide, and had made a bridge thereon for carrying it over the railway, the said bridge and the approaches (which were about 150 yards in length on each side of the bridge) being about 30 feet wide only, commanded the Company to restore the turnpike road according to the said act.

The Company returned, 1. That they had not "cut through and taken" the said part of the turnpike road within the meaning of the act. 2. That they had judged it necessary to erect the bridge to carry the road over the railway, and had made the bridge of a greater width than was required by the act. 3. That it was necessary, in consequence of the erection of such bridge, to make approaches also, and that they had made the approaches *as convenient to the public* as they could be made, in execution of the powers of the act, and as the original road had been. 4. That they were not authorized to injure any house, unless specified in the schedule of the act, or omitted by mistake, without consent; and that they could not obey the writ without injuring houses neither so specified nor omitted by mistake. 5. That they could not obey the writ without taking more land, and that their compulsory powers to take land had expired before they were required by the trustees of the road to widen it:—

Held, 1. That sect. 41 was not confined to the case of a turnpike road becoming impassable by the works of the Company, and of a temporary road substituted during such interruption; but that they had "taken" the road in question within the meaning of that section.

2. That the return was bad; and a peremptory *mandamus* was issued, commanding the Company to restore the road to its former width.

Held also, that the *minimum* of 15 feet is confined to the bridge itself, and does not apply to the approaches.

defendants to restore a turnpike road, carried over a railway, to its proper width, according to the force, form, and effect of the act of Parliament, (6 Will. 4, c. xiv.), incorporating the said Company.

Sir W. *Follett* and *Selfe*, in Easter Term, (May 10), 1840 (*a*), shewed cause against the rule, which was supported by Sir J. *Campbell*, Attorney-General, and *Greaves*.

Cur. adv. vult.

Lord DENMAN, C. J. (*b*)—In this case the question was, whether a *mandamus* lies to this Company, directing them to restore a turnpike road, carried over a railway, to its former width. *Primâ facie*, they are bound to make the road so lifted over the railway as wide as it was before, although there is a provision that the bridge, in such a case, shall be fifteen feet wide, dispensing, no doubt, with a greater width in that part. But we are clearly of opinion, that this *minimum* is confined to that part of the road which can strictly be called the bridge, and that we can by no means import into this case the doctrine, laid down with an entirely different object, that the approaches to a bridge form a part of it,—by which the road might be narrowed to a great extent beyond the bridge on either side (*c*). It was urged, that in this case no actual inconvenience is said to have resulted from what has been done; but this it cannot be necessary to consider in a case like the present.

Rule absolute.

The writ issued accordingly, tested 17th June, 3rd Vict., (1840), and, after reciting that the Company were incorporated by the said act, (6 Will. 4, c. xiv.), proceeded as follows:

(*a*) Before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Williams*, Js. See note at the end of this case.

(*b*) June 14, 1840.

(*c*) See *Regina* v. *The London and Birmingham Railway Company*, antè, Vol. 1, p. 317.

— [illegible] it was enacted, 'That for [illegible] *the provisions and restrictions* [illegible] *granted* for the said Company, their [illegible] and all other persons by them authorized [illegible] were thereby empowered to enter into [illegible] of any corporation or person whatsoever [illegible] and take the levels of the same, or of [illegible] and to set out and appropriate for the [illegible] of the said act such parts thereof, as they are by the said act empowered to take or use, and in or upon such [illegible] and lands adjoining thereto to bore, sink, dig, [illegible] and search, and to remove or lay, and also to [illegible] and manufacture any earth, stone, rubbish, [illegible] or sand, or any other materials or things which might be got or obtained therein or otherwise, in the execution of any of the powers of that act, and which might be proper or necessary for making, maintaining, altering, repairing, or using the said railway and other works by that act authorized, or which might obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of that act: and also for the purposes of, and according to the provisions of that act, to make or construct in, upon, across, under, or over the said railway, or other works, or any lands, streets, hills, valleys, roads, railroads, or tram-roads, rivers, canals, brooks, streams, or other waters, *such* inclined planes, tunnels, embankments, aqueducts, bridges, *roads*, ways, passes, conduits, drains, piers, arches, cuttings, and fences, *as the said Company should think proper*; and also to alter the course of any rivers, canals, brooks, streams, or water-courses, during such time as might be necessary for constructing tunnels, bridges, or passages over or under the same, and also to divert or alter the course of any roads or ways, or *to raise* or sink *any roads or ways, in order the more conveniently to carry the same over*, or under, or by the side of *the railway*.'

"'And (sect. 41) that in all cases wherein, in the exer-

cise of any of the powers thereby granted, any part of any carriage or horse-road, railway or tram-road, either public or private, should be cut through, *raised,* sunk, *taken,* or so much injured as to be impassable or inconvenient for passengers or carriages, or to the persons entitled to the use thereof, the said Company should, at their own expense, before any such road should be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road (as the case may require) to be set out and made instead thereof, as convenient for passengers and carriages as the said road so cut through, raised, sunk, taken, or injured as aforesaid, or as near thereto as might be, and where the road cut through, raised, sunk, taken, or injured, should be a turnpike road, *the substituted road, if temporary, should be* set out and made, and the principal road should be *restored* within six calendar months after the commencement of the operation.'

"'And (sect. 47) that where *any bridge should be erected* for carrying any turnpike road, public highway, or occupation road, *over the said railway,* the road over such bridge should be formed, and should at all times be continued, *of such width* as to have a clear and open space between the fences of such road of not less than 15 *feet;* and the ascent of every such bridge, for the purpose of such turnpike road, should not be more than 1 foot in 30 feet, and for the purposes of any public highway, not being a turnpike road, not more than 1 foot in 20 feet, and with respect to any private carriage or occupation road, not more than 1 foot in 13 feet; and a good and sufficient fence should be made on the sides of every such bridge, which fence should not be less than 4 feet above the surface of such bridge.'

"And whereas we have been given to understand &c. that you the said Company, in execution of the powers of the said act, and for the purposes thereof, have cut through and *taken* a certain part of a certain turnpike road, leading from the bottom of the High Street in the town

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of Cheltenham, in the county of Gloucester, to Tewkesbury, in the same county, near to a certain place called the Moors, in the parish of Cheltenham aforesaid, such part of the said turnpike road, so cut through and taken by you as aforesaid, then being of the width of 40 feet between the fences, that is to say, 29 feet in width thereof then being maintained as a hard road for carriages, and the remaining 11 feet thereof then being used and maintained as a raised footway for the convenience of foot passengers; and that you have also caused to be erected, within the space occupied by the said turnpike road, so cut through and taken as aforesaid, a *certain bridge*, for carrying the said turnpike road over the said railway, of the *width of* 30 *feet* 4 *inches* only between the fences of the said bridge, and without any footway by the side of the road over the bridge; and that you have also caused certain *approaches* to the said bridge to be made along the line of the said turnpike road, and within the space occupied by the same, and which said approaches are respectively of the lengths following, that is to say, the approach on the Tewkesbury side of the said bridge of the length of 187 yards, and the approach on the Cheltenham side of the said bridge of the length of 126 yards; and *which said approaches* are of the following breadths respectively, that is to say, the approach on the Tewkesbury side of the said bridge is of the breadth of 30 *feet* 2 *inches*, and no more, at the end next to the said bridge, and thence gradually increases to the breadth of 39 *feet* 8 *inches*, and no more, at the end of the said approach furthest from the said bridge; and the approach on the Cheltenham side of the said bridge is of the breadth of 30 *feet* 2 *inches*, and no more, at the end next to the said bridge, and thence gradually increases to the breadth of 30 *feet* 8 *inches*, and no more, at the end of the said last-mentioned approach furthest from the said bridge; and that you the said Company have not made any footpath along the said approaches, or either of them, and that

you did commence the operation of cutting through and taking the said turnpike road on the 22nd day of November, 1838—

"And whereas you the said Company were duly required, on behalf of the trustees of the said turnpike road, to make and restore the said turnpike road, with a footway, to the full breadth of 40 feet, as aforesaid, within six calendar months after the commencement of the said operation of cutting through and taking the same as aforesaid, as required by the said act, but that you the said Company have wholly neglected and refused," &c.

The mandatory part of the writ then required the Company to make and restore, or cause to be made and restored, the said part of the said turnpike road according to the force, form, and effect of the said act of Parliament, &c.

Return, (of 2nd November, 1840), "That true it is, that by the said act of Parliament in the said writ mentioned, it was enacted," &c., (sect. 41), "But that we the said Company have not, in execution of the powers of the said act and for the purposes thereof, cut through and taken the said part of the said turnpike road, in the said writ of *mandamus* particularly mentioned and specified, within the intent and meaning of the said last-mentioned enactment hereinbefore in this return recited.

"But that we, in execution of the powers to us given by the said act, did judge it necessary to erect the said bridge, in the said writ of *mandamus* mentioned, for the purpose of conveying the said turnpike road, in the said writ mentioned, over the said railway authorized by the said act to be made, and which has accordingly been made by us in pursuance thereof.

"And that we accordingly erected and made the said bridge of a certain width, to wit, of the width of 30 feet 2 inches in the narrowest part thereof, and that the road over the same has been formed so as to leave, and does in

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fact leave a clear and open space between the fences of the said road of more than 30 feet, being a much greater width than is required by the said act of Parliament.

"And that, in consequence of the erection of the said bridge under the powers of the said act, it became and was necessary also to make approaches to the said bridge, and that we caused such approaches to be made to the said bridge along the line of the said turnpike road, which said approaches are respectively of certain lengths and breadths, to wit, of the respective lengths in the said writ in that behalf mentioned, and an average breadth of 34 feet, and no part thereof of less than 30 feet 2 inches, and the ascent of which said approaches and bridges is not more than 1 foot in 30 feet, being the ascent required by the said act.

"And that the carriage way of the said part of the said turnpike road in the said writ mentioned, before the making of the said bridge and approaches by us the said Company, was of the width of 29 feet and no more, with a footway raised 2 feet above the level thereof.

"And that the said *approaches* and bridge, so made by us the said Company as aforesaid, are *as convenient* to the public as the same could be made by us in execution of the powers of the said act, and as convenient to the public as the said part of the said turnpike road was in its original state, before the making of the said approaches and bridge by us the said Company.

"And that, by the said act in the said writ mentioned, it was amongst other things further enacted, (sect. 20), that nothing therein contained should authorize the said Company, or any person acting under their authority, to take, injure, or damage, for the purposes of the said act, any house or other building which was erected or built on or before the 30th day of November, 1835, other than and except such as are specified in the schedule to the said act annexed, without the previous consent in writing of the owner and occupier thereof respectively, unless the omis-

sion thereof in the said schedule should have proceeded from mistake, and unless it should have been so certified, in manner therein before provided for in case of unintentional error in the said books of reference.

"And that, in order to carry the said turnpike road more conveniently over the said railway by means of the said bridge, it became and was necessary, in execution of the powers of the said act, to raise, and we the said Company accordingly did raise, the said parts thereof, which now form the approaches to the said bridge, above their former level, the same being of such ascent as is hereinbefore mentioned.

"And that by reason thereof we cannot now widen the said approaches to the said bridge without materially injuring and damaging divers, to wit, twenty houses, which were erected and built before the 30th of November, 1835, and which then and from thence hitherto were and still are the property of divers other persons, and not of us the said Company, which are situate, standing, and being on the north-eastern side of the said approach and near thereto, none of which said houses are specified in the schedule to the said act annexed, and the omission whereof in the said schedule has not proceeded from mistake, nor is nor can the same be so certified to have proceeded from mistake, as in the said act mentioned.

"And that we cannot widen the said approaches to the said bridge without taking and purchasing for that purpose an additional quantity of land, which before and at the time of the passing of the said act was, and from thence hitherto hath been, and still is, the property of divers other persons, and not of us the said Company; and that the compulsory powers, given to us the said Company by the said act, to take and purchase land for any such purposes, had expired before we the said Company had any notice or were required by the said trustees in the said writ mentioned to widen the said approaches, and that

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of the said Company had not then, nor have since had, nor have now the power to take or purchase any land for such purpose.

"And we the said Company hereby humbly submit and return that we cannot and are not bound to make and restore, or cause to be made and restored, the said part of the said turnpike road in the said writ mentioned, in any other manner than we have already done, and that we have complied with the said act of Parliament so far as the same relates thereto. Given and humbly certified and returned by us, under our common seal," &c.

The case was argued after a *concilium* in the following *Trinity* Term.

The points, of which notice was given on the part of the prosecution, were:—

1. That it is admitted by the return that the Company made the bridge, for the purpose of carrying the turnpike road over the railway, of a less width than the road was before the road was cut through by the Company.

2. That the same is admitted with respect to the approaches made to the bridge.

3. That the allegation, that the Company had not cut through and taken the turnpike road within the intent and meaning of the act, was an insufficient traverse of the allegation in the writ.

4. That the allegation, that the approaches and bridges are as convenient to the public as the same could be made, and as convenient to the public as the said part of the turnpike road was in its original state, is no answer, as the Company were bound to restore the road, and make the bridge and approaches respectively of the same width as the road before it was cut through by the Company.

5. That the words "the said part of the said turnpike road" are equivocal, and, if they apply to the carriage way, are no answer to the taking the turnpike road, consisting of the carriage way and footway, as in the writ alleged.

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6. That the excuse that the Company cannot widen the approaches without materially injuring divers houses, &c., is insufficient.

7. That the return does not allege that the consent of the owners of such houses cannot be obtained.

8. That the return should have shewn how such houses would be injured.

9. That it is no excuse that the compulsory powers of the act to purchase land expired before the Company were required to widen the approaches, as the Company were bound to perform their duties under the act, whether they were required to do so or not.

Sir *J. Campbell,* Attorney-General, against the return (*a*). —In this case the writ issued to restore the road, of which incidentally the bridge is part, and ought to be of the same width, unless the 47th sect. enables the Company to narrow it. By sect. 41 they are bound to make the whole road as wide and commodious as the former. Then sect. 47 gives no powers, but imposes an additional obligation that the bridge shall be at least 15 feet wide. Occupation roads are put upon exactly the same footing, and if the Company's interpretation is the correct one, they might have reduced the bridge to 15 feet, though *ex gratiâ* they have given 30 feet: but as the road is to be of its ancient width in every other part, it should be more especially so at the bridge. This is contrary to the opinion of Lord *Denman,* C. J., expressed in the case of *Regina* v. *The London and Birmingham Railway Company* (*b*), but in *Rex* v. *The Regent's Canal Company,* cited in argument in that case (*c*), it was held by Lord *Tenterden,* C. J., that the bridge should be at least as wide as the road. Then it is acknowledged that for 300 yards they have contracted the

(*a*) June 2nd, 1841, before Lord *Denman,* C. J., *Patteson, Williams,* and *Coleridge,* Js.

(*b*) Antè, Vol. 1, p. 317.

(*c*) Id., p. 323.

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road in the approaches, for which sect. 47 gives no special authority; therefore, as the writ has not been obeyed, and no excuse is alleged, a peremptory *mandamus* ought to issue.

Sir *W. Follett*, contrà.—The judgment of the Court in issuing this *mandamus* is inconsistent with that of the Vice-Chancellor in the case of *The Attorney-General* v. *The London and Southampton Railway Company* (*a*). The better way to settle the law would have been by demurring, and then a writ of error might be brought. [*Patteson* J.—It could not be done: *Rex* v. *Oundle* (*b*). Lord *Denman*, C. J., —If a return is traversed, the traverse may be demurred to.]

The act of Parliament, speaking of the bridge, means not the span but the whole work, and the approaches are part of the bridge: *Rex* v. *The Inhabitants of Oxfordshire* (*c*). The argument on the other side rests on the assumption that this is within the 41st sect., and that the Company are to restore the road; but this is not a case under that section. The 29th gives general powers to construct works most convenient for the railway. Then there are two other clauses controlling these powers. The 46th is the only provision which confines them to 15 feet in crossing a carriage road (*d*). All turnpike roads are by statute of considerably greater width, and so are parish roads. The 41st sect. means, that, before they commence works disturbing roads, they shall set out and make another good and sufficient road, and in the case of a turnpike road they shall finish in six months. That is the only clause applicable to carrying roads over a railway. [*Patteson*, J.—They seem to contemplate permanently diverted turnpike roads, for

(*a*) Antè, Vol. 1, p. 302.
(*b*) 1 A. & E. 283.
(*c*) 1 B. & Ad. 289.
(*d*) Sect. 46 provides, that where the railway shall be carried over a public carriage-road by a bridge, a clear space of at least 15 feet wide shall be left under the arch.

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the words "if temporary" are used.] The Vice-Chancellor thought that clause not applicable. In the amended act there is a clause (sect. 16) for widening the bridge over the Holyhead road (*a*). [*Coleridge*, J.—There the approaches are introduced specifically.] That is very much in point, for it shews that the legislature in the 46th and 47th sects. did contemplate alterations in other than turnpike roads, while it appears from the language of sect. 41, that "*restoring*" has no relation to any thing but a turnpike road. That would be an answer to both propositions, but they have no right under this act to require the turnpike road to be made as wide as it was before in any part. There is a general power to divert roads, and to take them over or under, without any restriction except as to width at the

(*a*) Stat. 7 Will. 4, c. xxvi. s. 16, (reciting sect. 47 of the stat. 6 Will. 4, c. xiv., and that it may be necessary to erect a bridge for the purpose of carrying the said railway from Birmingham to Gloucester over the turnpike road called "The London and Holyhead," at Smallheath, near Birmingham, and the dimensions of bridges over public carriage roads specified in the said act will be wholly insufficient and unfit for such a bridge as the public convenience will require for carrying the said railway over the said London and Holyhead road), enacts, "That the said recited clause, so far as it relates to the turnpike road called the London and Holyhead road, shall be henceforth repealed, and in lieu thereof it is further enacted, that plans and specifications of every bridge, tunnel, or viaduct, which it may be necessary to erect or construct for carrying any part of the said railway over or under the said London and Holyhead turnpike road, and of the approaches thereto respectively, shall be submitted to the commissioners for the time being, acting under the authority of an act (3 & 4 Will. 4, c. 43, the Holyhead road Act), for the approval of the said commissioners, previously to the commencement of the erection or construction of any such bridge, tunnel, or viaduct, and of the approaches thereto respectively, and that the width and height of every such bridge, tunnel, or viaduct, and the mode of construction thereof, and of the approaches thereto respectively, shall be settled and determined by the engineer for the time being of the said commissioners, and by the engineer for the time being of the said Company; and, in the event of their differing in opinion with regard thereto, then by some third person to be appointed by them, whose decision in the matters referred to him shall be final and conclusive."

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bridge. The proper course in all these cases is not to wait till the works are done, but while they are in progress to make their demand; they made none here until the works were completed. Therefore, if the Vice-Chancellor thought it right to refuse an injunction, there will be still greater objection to issuing a peremptory *mandamus* in a case like this. The Company cannot do it; the time has expired in which by sect. 103 they have power to take the land. It would be a *mandamus* to commit a trespass; and it is a sufficient return to say there is no power; *Rex* v. *The Commissioners of Sewers in Essex* (*a*); and in *Regina* v. *The Eastern Counties Railway Company* (*b*), where it appeared by the return the funds were not sufficient, this Court seemed to be of opinion that would be a sufficient answer.

Sir *J. Campbell*, Attorney-General, in reply.—The Company did not commence operations till after the compulsory powers ceased. The 29th sect. gives no power to narrow the road to 15 feet, as is contended, and both the 46th and 47th sects. are restrictive, not enabling clauses. As to the amended act, that is introduced by the Company, and must be supposed to speak the language of the framers of it; but they have not done it very effectively, for they do not say the bridge shall be as wide as the road, which might have afforded a colour of argument, but that certain umpires are to be consulted as to the whole construction. As to the case of *The Attorney-General* v. *The London and Southampton Railway Company* (*c*), the Vice-Chancellor there refused the injunction, and threw out an opinion that the approaches are to be considered as part of the bridge, can that be said of 250 yards north and 250 south of it? In *Rex* v. *The Inhabitants of Oxfordshire* (*d*), it was held, that they were not bound to repair the arches more than

(*a*) 2 Strange, 763; 2 Ld. Raym. 1479.

(*b*) Antè, Vol. 1, p. 509.

(*c*) Antè, Vol. 1, p. 302.

(*d*) 1 B. & Ad. 289.

300 feet from the end of the main bridge; and see *Rex* v. *Devon* (*a*). A peremptory *mandamus* will go unless the writ is bad, as in *Regina* v. *The Eastern Counties Railway Company* (*b*) and *Rex* v. *The Church Trustees of St. Pancras* (*c*), as they have returned nothing to excuse them from doing what the act requires, and it does not appear that they cannot obtain the land by consent.

Cur. adv. vult.

Lord DENMAN, C. J., at the sittings after the Term, delivered the judgment of the Court.—This case comes before us upon a return to a writ of *mandamus*, from which it appears that the said Company, by virtue of the act 6 *Will.* 4, c. xiv. have for the purposes of this railway taken a certain portion of the turnpike road, leading from Cheltenham to Tewkesbury, and erected a bridge thereon to carry the same over the railway, the whole length of road taken being 187 yards on one side of the bridge, and 126 yards on the other. It further appears that the said turnpike road was, before the alteration by the Company, of the breadth of 40 feet, viz. 29 carriage road and 11 raised footway; but that the breadth now is on one side of the bridge 30 feet 2 inches, gradually increasing to 39 feet 8 inches, and on the other 30 feet 2 inches, increasing to 30 feet 8 inches, the breadth of the bridge itself not being in question. The mandatory part of the writ in substance directs the said Company to restore the said approaches to the bridge to their former state.

The return states that what the Company has done is not within the meaning of the said act, and also gives certain reasons why the writ cannot be obeyed. And the question at last comes to this, whether this case is within the 41st sect. of the said act; because, except that section be applicable, there is no direct provision in the act bear-

(*a*) 14 East, 477. (*b*) Antè, p. 260. (*c*) 3 A. & E. 535.

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ing upon the case. For, although by the 46th and 47th sects., the breadth of the bridges over turnpike roads is prescribed (15 feet), there is no direction as to the width of the approaches, of whatever length they may be, and consequently whatever quantity of turnpike road may have been "*taken*" by the Company in order to construct them. It therefore follows, that whatever may have been the breadth of the turnpike road before, the breadth of the part applied to the use of the Company is left absolutely to their discretion, except there be an *implied* direction to make the approaches as wide as the bridge itself.

The 41st sect. is as follows. [His Lordship read the section.] The argument was that this section is confined to the case of a turnpike road being made impassable by the works of the railroad, and a temporary road being substituted during such interruption. That a portion of this turnpike road has been "taken," within the words and obvious meaning of this section, we think is clear. How the works were actually carried on we do not learn from the writ itself or the return, that is, whether there was a temporary line substituted during the progress of the works for the whole of the old turnpike, or how much. That there must have been some substitution in that part of the old line where the bridge has been constructed, is obvious; that there must have been the like, during the alterations which we find have been made along the whole or the greatest part of the rest of the line, is probable. And accordingly, we think, in the absence of any other provision, in a matter greatly affecting the public convenience, that it is not too forced a construction of this section to consider this as being a road which the Company was bound to restore within the specified time.

With respect to the rest of the return, to which we have referred generally, that the Company *cannot* now obey the writ for the reasons therein specified, we have had frequent occasion to observe, that we consider such an excuse inad-

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missible. When the Company avail themselves of the very great powers with which they are vested against the public, they should take care to act strictly within those powers. As to the compulsory rights of taking land &c. having expired, that rests entirely with the Company; for the act having passed in the year 1836, the works in question were not begun till more than two years after, when the power was gone. The notice to them is alleged to have been in time according to the act.

It remains for us to notice a case cited in the course of the argument, in which, as was said, the Vice-Chancellor has put a different construction upon a clause in another act of Parliament resembling the present. It is true that his Honour does, in the case of *The Attorney-General* v. *The London and Southampton Railway Company* (*a*), intimate incidentally such an opinion as has been attributed to him, the *question* before him then being, whether he should declare by his order a certain "archwork" of the said Company to be a nuisance, and prohibit them from further prosecuting their works, because they were about to abridge the width of a public highway. The point, however, which now comes before us seems to have been very slightly touched in the argument, and was wholly unnecessary for the *decision* of the Vice-Chancellor, which was, that, provided the said arch "be not less" than the width prescribed by the act of Parliament, he did not feel himself to be justified in making the order desired. The Vice-Chancellor also gives us a further reason for not making that order, that "many other methods" were open to raise the question, (alluding especially to an indictment for a nuisance), without his interference. We cannot, therefore, consider this to have been the deliberate judgment of the Vice-Chancellor upon this subject.

(*a*) Antè, Vol. 1, p. 302.

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The result is, that the rule for a peremptory *mandamus* must be absolute.

Peremptory mandamus awarded (*a*).

(*a*) IN THE BAIL COURT.

In Michaelmas Term, 1839.

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A rule having been obtained to enlarge the time for shewing cause to a rule for a *mandamus*, the Court opened the rule, and imposed the following terms:—That the Company should repair the fences on each side of the road, to the satisfaction of two justices, one to be chosen by each party, and they to choose a third, if necessary; and in case the rule for a *mandamus* should be discharged, the trustees of the road should pay the costs of repairing the fences.

IN this term Sir *W. Follett* had obtained a rule to enlarge the time for showing cause to the above rule till *Hilary* Term, 1840, on an affidavit stating the length of the affidavits, and that they should not have time to answer them by the day of the rule to shew cause.

Greaves now (*a*) applied to open the rule and impose terms on the Company.—He contended that as they had come to ask a favour, the Court would only grant it on reasonable terms, and that one of them should be, that it should come on as a motion in the next term, and not be put into the peremptory paper; and also, that in the mean time, the Company should put the premises into complete repair, so as to prevent the possibility of accident. He relied strongly on affidavits shewing the dangerous state in which the road was. [*Littledale*, J.—I cannot order this to come on as a motion, and I know of no precedent for imposing the terms of repairing fences upon a Company; after a motion has been made, the Company will act at their peril, if they permit the place to continue in a dangerous state, and any accident occurs.]—That is not sufficient, the public are now actually in danger, and these terms are sought in order to protect them from such danger. If a life should be lost, it will be no answer that the Company are punishable by indictment for leaving the road out of repair. Nor would indictment be a sufficient remedy. Even if they should be convicted, and a fine imposed, so powerful a Company may pay the fine, and leave the place in the same state; or they may (as in one instance they have done) refuse to plead (*b*). A *mandamus* is a specific remedy, like a bill for a specific performance, and if the Company refuse to obey it, all their goods may be seized under a *distringas* until they perform the act they are commanded to do.

LITTLEDALE, J., (after consulting the full Court).—The terms suggested are, that the Company shall repair the fences on each side the road, to the satisfaction of two justices, one to be chosen by each party, and they to choose a third, if necessary; and in case the rule for a *mandamus* shall be discharged, the trustees of the road shall pay the costs of so repairing the fences; otherwise, if the rule shall be absolute.

Rule enlarged on those terms.

(*a*) November 26, 1839, before *Littledale*, J.

(*b*) *Reg.* v. *The Birmingham and Gloucester Railway Company*, *post*, Vol. 3.

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June 14.

MANDAMUS (*a*), tested 25th November, 3 Vict. (1840), suggesting as follows:—That, by an act (7 Will. 4, c. xxiv.) enabling the Company to vary their line, and reciting, in sect. 38, that the new line of the railway would cross the turnpike road leading from Oldham to Rochdale, at a different place from that specified in their original act, (6 & 7 Will. 4, c. cxl.), and that it would be necessary to lower the bed of the turnpike road at the place where the railway would cross the same, in order to maintain a proper level in the line of the railway, and to allow of a sufficient space under the bridge, whereon the railway was to be carried across the turnpike road, for the passage of coaches, waggons, and other carriages, along the road, and that it was expedient that provision should be made for preserving a proper level in the line of the turnpike road, it was enacted (*b*), that it should not be lawful for the said Company to carry the line of the said railway, or to make the same across the said road, unless the same should be carried and made at their own expense over the road by means of a bridge of the width of 30 feet at the least, for

By a railway act (6 & 7 Will. 4, c. cxl. s. 94) a Company were empowered generally to divert, raise, sink, or deepen any roads, in order to carry the same over, under, or by the side of the railway, subject to the provisions and restrictions of the said act. By another act (7 Will. 4, c. xxiv., enabling them to vary their line) they were authorized (s. 38) to carry the line of railway across a certain turnpike road, by means of a bridge of the width of 30 feet at the least, and for that purpose to lower the then present bed of the road, but, in so doing, were required to leave a certain inclination on each side of the bridge, and headway under it, and to relay and *reform* the road.

The Company made a bridge 30 feet wide, over a turnpike road 42 feet wide, consisting of 30 feet carriage way and two footways of 6 feet each. They lowered the carriage way of the road, but left the footways at their original level.

On the trial of certain traverses to a return to a *mandamus* which had issued to the Company to reform the road, and to lower it the whole width of 42 feet, the jury found—1. That the Company had not so lowered the road. 2. That they had *reformed* the road, in compliance with the act. 3. That the road so made by the Company *was more commodious to the public*, than if the whole road had been lowered to the full width of 42 feet.

Held, that the word "road" meant the whole road, including footpaths; and, therefore, that the Company had not *reformed* the road as required by the act.

And, that the finding of the jury upon the last issue, as to its being *more commodious*, was not sufficient to dispense with a compliance with the language and meaning of the act.

(*a*) Ante, Vol. 1, p. 523. (*b*) Sect. 38.

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the purpose of forming a clear carriage road of 24 feet wide, and a footpath of 6 feet wide, exclusive of the pillars or piers which might be placed between the footpath and the carriage road, and of the height of 18 feet, at least, from the surface of the road to the under side of the bridge, so as to leave a clear and uninterrupted headway under the bridge of 18 feet at the least. And further, that in case it should be expedient to lower the surface of the road, for the purposes aforesaid, then it should not be lawful for the Company to lower or alter the present bed of the road, unless the same should be lowered at their own expense on both sides of such bridge, so that when the alteration should be completed, the ascent on the road southwardly from the bridge, so far as the alterations therein should extend, should not exceed 1 foot in height for every 50 feet in length, and so that the ascent of the road northwardly from the bridge should not exceed 1 foot in every 100 feet on any part of the said road so to be made or altered; and that the Company should at their own expense make all new fences, drains, and works, and alter all existing ones, and relay and reform the road, and perform all other matters and things that might be rendered necessary for the forming of such railway; and also at their own expense make, and at all times keep in repair good and sufficient drains or culverts, for the purpose of draining or laying dry so much of the road as should be lowered or altered as aforesaid; and that the alteration of the surface or bed of the road should be made and constructed under the superintendence and direction of the trustees of the road, or of the surveyor or other person authorized by the trustees to act on their behalf in the premises.

The writ then proceeded,—"And whereas we have been given to understand &c. that in the execution of the powers granted by the said acts, you the said Company have built and constructed a bridge or viaduct for carrying the said railway over and across the said turnpike road, and have

excavated and lowered the road underneath the bridge or viaduct, for the purpose of affording a passage, with the requisite headway, for carriages under the same, for the distance of divers, to wit, 236 yards northwardly from the bridge or viaduct, and for divers, to wit, 201 yards southwardly from the same—

"And whereas the *said turnpike road, previous to and at the time of such excavations and alterations made therein by you the said Company*, was a good, solid, and substantial road, of the breadth of 42 feet throughout; and whereas, in the alterations and excavations made by you, you have in no part lowered and excavated the road to its former breadth of 42 feet, but *to the breadth of* 35 *feet only* northwardly from the bridge or viaduct, and to the breadth of 24 feet only southwardly from the same, and have commenced building walls along the sides of the road so lowered and excavated by you, without having made and excavated the same to its former proper width of 42 feet—

"And whereas you the said Company have not reformed the road in a proper and substantial manner, nor have you made and constructed such alterations in the surface and bed of the road under the superintendence and direction of the trustees of the road, or of the surveyor or other person authorized by the trustees to act on their behalf, as by the said last-mentioned act of Parliament is directed."

The writ, after reciting the refusal by the Company, &c., then proceeded to command the Company "to make and excavate the turnpike road, on both sides of the bridge or viaduct, for so far in length as the excavation thereof by you the Company extends, *the whole width of* 42 *feet*, &c., and that you reform the road in a proper and substantial manner, &c., or that you shew us cause," &c.

The material parts of the return stated the general discretionary power given to the Company by their original act, to enter and take lands for the purposes of the act, and also to make or construct in, under, upon, across, or over

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the railway, such roads, &c., or other works, as they should think proper:

"That the Company had, in execution of their powers, constructed the bridge in the writ mentioned of a width exceeding 30 feet, and that the carriage road under the bridge was made 24 feet wide, and the footpath on the easterly side more than 10 feet, and the footpath on the westerly side of the same width:

"That, in order to maintain a proper level in the line of the railway, and to allow of a sufficient space under the bridge, whereon the railway is carried across the said turnpike road, for the passage of coaches, &c., it had been deemed expedient to lower the surface of the road, and that they had accordingly lowered the road for affording a passage with the requisite headway:

"That they had lowered the road so that the ascent on either side complied with the act, as recited in the writ:

"That the road, before it was excavated by the Company, did not exceed 42 feet in width, including both the carriage road and certain footpaths made on the line of the said road, *i. e.* a footpath on the easterly side thereof for so far in length as the excavations of the Company in the writ mentioned extend; and another footpath on the westerly side thereof for part of the said distance to which the excavations of the Company extend, and which respective footpaths have been left by the Company at their former height and level:

"That in executing the works *they had lowered and excavated the said carriage road* northwardly from the bridge, for so far in length as the excavations made by them northwardly from the bridge extend, to wit, for the distance stated in the writ, *to its full former breadth*, that is to say, to the full breadth of such *carriage road* previous to and at the time of the commencement of such excavations and alteration, to wit, to a breadth varying from 35 to 36 feet, or thereabouts; and that they had lowered and excavated

the said carriage road southwardly from the bridge for so far in length as the excavations made by them southwardly from the bridge extend, that is to say, for the distance in the writ mentioned, to the full former breadth of such carriage road, that is to say, to the full former breadth of such carriage road previous to and at the time of the commencement of such excavation and alteration, to wit, to a breadth varying from 30 feet 3 inches to 30 feet 6 inches, or thereabouts, in that part of the road where there were and are footpaths on both sides, and a breadth varying from 35 feet 4 inches to 36 feet, or thereabouts, in that part of the road where there was and is a footpath on the easterly side only:

"That they had left the footpath on the easterly side of the road, northwardly and southwardly from the bridge, for so far in length as their excavations extend, at its former height and level, and that they had left the footpath on the westerly side of the road, southwardly from the bridge open 112 yards southwardly therefrom, where such footpath existed previous to and at the time of such excavation and alteration, and that they had left the same at its former height and level, which last-mentioned footpath is continued by and through one of the arches of the bridge, that is, the arch on the westerly side thereof, for a footway of 10 feet as aforesaid to the north side of the said bridge, where the same is let down by an inclined path into the road near the bridge on the north side thereof:

"That they had divided the footpaths from the carriage road with steps in the footpaths at proper and convenient distances, to communicate between the carriage road and footpaths respectively:

"That they *had reformed the road* in a proper and substantial manner, according to the directions of the act:

"That the carriage road and footpaths respectively as now made and completed, and as they now exist, are more *commodious and convenient* to the public, &c., than the same

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would be, if the same were excavated and lowered to the full breadth of 42 feet, as required by the writ:

"That they had fully complied with the statutes as to the making of the alterations and excavations in the said road, and in reforming the same, doing as little damage as might be in the execution of their powers."

The material pleas to this return were—

2. Traverse that the Company had lowered or excavated the carriage road northwardly from the bridge, for so far in length as the excavations extend in that direction, to the full former breadth, &c.

3. The same traverse as to the excavation southwardly.

12. Traverse as to the Company having reformed the road, as stated in the return.

13. Traverse as to the road, as completed by the Company, being more commodious than if it were excavated to its full former breadth of 42 feet.

14. Traverse as to the Company having complied with the said acts of Parliament in making the said alterations and excavations.

Issues were joined on the above traverses, and tried at the Summer Assizes, at Liverpool, 1840. The 2nd and 3rd issues were found for the Crown. The 13th for the defendants, as also the 12th and 14th, except as to certain drains under the road.

In *Michaelmas* Term, 1840, *R. Alexander* obtained a rule *nisi*, calling upon the defendants to shew cause why judgment should not be entered up for the Crown, notwithstanding the verdict found for the defendants on the 12th and 13th issues; and why a peremptory writ of *mandamus* should not be awarded; and *Cresswell* a cross rule for entering up a verdict for the defendants, notwithstanding the verdict found against them on the 2nd and 3rd issues. Both rules now came on together for argument (*a*).

(*a*) June 2nd, 1841, before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

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Cresswell, Sir *W. Follett*, *R. C. Hildyard*, and *Tomlinson*, for the defendants.—There is nothing in either of the statutes requiring the Company to lower the road to its full width, only for the purpose of giving sufficient head-room. If the legislature had said the turnpike road shall be 30 feet wide, the Court would interfere, but when it is seen that the directions have been so particular as to gradients and ascents, and are silent about width, it is clear that was intended to be left to the discretion of the Company. The preamble of the 38th sect. of the 6 Will. 4, c. xxiv., shews it was not intended to protect the width but the level. The 44th sect. empowers the Company, in case of their appropriating a turnpike road of any width, to substitute another 30 feet wide, so here, if they had taken the road altogether, that width would have been sufficient. It is submitted, therefore, that what has been done in this case is a sufficient compliance with the act, especially as the jury have found in favour of the Company on the issues as to the road being *reformed*, and made *more commodious* to the public than before (*a*).

That being so, the Court will not interfere by peremptory *mandamus*, it being entirely in their discretion to grant it or not; see Com. Dig. Mandamus (A.) and (D. 6); *Rex* v. *The Commissioners of Excise* (*b*); *Rex* v. *The Mayor of Axbridge* (*c*); *Rex* v. *The Mayor of London* (*d*); *Rex* v. *Tidderley* (*e*); and *Rex* v. *Griffiths* (*f*): especially as there is another remedy by indictment. The reason why a *mandamus* was issued in the case of *Rex* v. *The Severn and Wye Railway Company* (*g*), was, because there the remedy by indictment would not have been so effectual or beneficial to the public.

Sir *J. Campbell*, Attorney-General, *Kelly*, and *Starkie*,

(*a*) See *Rex* v. *Russell*, 6 B. & C. 566.
(*b*) 2 T. R. 381.
(*c*) 2 Cowp. 523.
(*d*) 2 T. R. 177.
(*e*) 1 Sid. 14.
(*f*) 5 B. & A. 731.
(*g*) 2 B. & A. 646.

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for the Crown.—The test will be, whether, if the facts proved by the jury had been returned to the *mandamus* by the Company, it would have been sufficient. The question of commodiousness is only one of fifteen issues, and if it is to be allowed that an appeal is to be made from a solemn compact between parties to a jury, to say whether or not there is an equivalent, so as to supersede the enactments of the legislature, the rights of the public may be entirely extinguished. See *Rex* v. *Ward* (*a*). The public in this case was seised and possessed of a carriage way 36 feet wide. Sect. 38 recites the necessity of lowering the *bed*, that is, of the whole road. Where the legislature intends to confer a power of narrowing a carriage way, so that the public shall sacrifice a portion of their rights, it is done by express terms, not by implication. If, therefore, it had been intended that a jury should determine whether a road might be reduced, provided it were made more commodious, it would have been so enacted. The case of *Regina* v. *The London and Birmingham Railway Company* (*b*) shews the view Lord *Denman*, C. J., took of a similar act, in which, moreover, it was expressly provided, that the substituted road should be *as convenient*. His Lordship says there, "It appears to me a matter of necessity, that contracting a road makes it less convenient."

With respect to the issue as to *reforming* the road, that ought to have been found for the Crown. *Reforming* comprehends all that has gone before. It means making a proper and substantial road in every respect for the public, including fences, drains, proper distribution of stones and gravel, and airing. The jury have negatived one essential ingredient, the drains, and therefore the 97th sect. of the original act has not been complied with (*c*). Nor has

(*a*) 6 N. & M. 38.

(*b*) Antè, Vol. 1, p. 317.

(*c*) Which requires the Company, where a road has been sunk, taken, or injured, to *restore* it within six months. See a similar clause (s. 41) in the Birmingham and Gloucester Railway Act, antè p. 697.

this road been *lowered* in the manner required by sect. 38. The word road includes carriage road and also foot-road, which has not been altered in this instance. In *Loveridge* v. *Hodsoll* (*a*) the foot-path was held to be part of the road under the General Turnpike Act, (3 *Geo.* 4, c. 126, s. 111).

As to this being a case for indictment, not *mandamus*, that point was answered on moving for this rule (*b*), on the authority of *Rex* v. *The Severn and Wye Railway Company* (*c*). That has been since confirmed by the case of *Regina* v. *The Bristol Dock Company* (*d*); and see *Regina* v. *The Eastern Counties Railway Company* (*e*).

Cur. adv. vult.

Lord *Denman*, C. J., now delivered the judgment of the Court.—This question comes before us on a return to a *mandamus*, directing the Manchester and Leeds Railway Company to excavate a certain part of the Oldham and Rochdale turnpike-road, taken by them to complete their said railway, to the old breadth of the old road.

From the *mandamus* and return it appears that the said Oldham and Rochdale turnpike-road was, at the place where the said railway crosses the same, of the breadth of 42 feet; viz. 36 feet carriage and 6 feet footway; and, further, that by the 7 *Will.* 4, c. xxiv., s. 38, the said Company were to construct the bridge, by which the road was to be crossed, of the width of 30 feet at the least, and also, as the road was to be lowered, that the same should be done so that the ascent from the bridge should not exceed the specified amount. The bridge had been constructed of a width exceeding the directions of the act, and the road has been excavated on each side of it, but not to the whole extent of its ancient width.

(*a*) 2 B. & Ad. 602, *per Parke* and *Taunton*, Js.
(*b*) Antè, Vol. 1, p. 527.
(*c*) 2 B. & A. 646.
(*d*) Antè, p. 599.
(*e*) Antè, p. 260.

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Upon the said return various facts were traversed, and issues thereon raised have been found by the jury.

Those upon which reliance is chiefly placed, on behalf of the prosecutors, are the second and third, wherein it is found that the said Company have not lowered or excavated the said carriage road to the *full former breadth* of the said carriage road. And upon the part of the defendants, the 12th and 13th issues are relied on, upon which the jury have found that the Company *have reformed the said road* in a proper manner, except as to the drains; and that the road as it now is, *is more commodious and convenient* than if lowered or excavated to the full former breadth of 42 feet.

The question resolves itself into this, whether the excavation or lowering of the road should be extended to the whole original breadth of 42 feet, or whether what has been done, which, by the return, appears to fall short of that, in the proportion therein specified, is sufficient to satisfy the provisions of the act.

On the one side it has been contended, that (as is true) there is no express provision upon the subject, that some discretion is necessarily left to the Company, and that the finding of the jury upon the 13th issue, to which we have adverted, shews that such discretion has been fairly and beneficially exercised.

On the other side it has been argued, that, as no width is specified, except so far as the bridge itself is concerned, it follows that, as to the rest, the road, after the excavation or lowering rendered necessary for the purpose of the Company, should remain of its original width, and that the abridgment of the width, where intended, being expressed, is in favour of the latter construction. It follows, therefore, that we are called upon to put an interpretation upon the clause of the act itself.

That clause (7 *Will.* 4, c. xxiv., s. 38) authorizes the Company to make the new line of their railway across the

road in question, and prescribes the terms and conditions upon which they are permitted to do so. It is declared "to be expedient that provision should be made for preserving a proper level in the line of *the said turnpike road.*" And further, "that in case it shall be necessary to lower the surface of *the said road,* for the purposes aforesaid, it shall not be lawful for the Company to lower or alter *the bed of the said road,*" except upon the terms specified. Those terms are, "that *the same* shall be lowered *on both sides* of the said bridge (the bridge prescribed), with a certain ascent each way. It is observable, therefore, that wherever in this section the road is mentioned, and more particularly in the clause last cited, the *whole* road, and not any part of it, is spoken of, and the road is to be lowered on both sides of the bridge to its full width, for none other than that is alluded to. We must also observe, that throughout the clause no mention is made of lowering the road in such manner as to render the same "more commodious and convenient to the public," so as to supersede the necessity of a literal compliance with the terms prescribed by the act itself. We cannot therefore consider the finding of the jury upon the 13th issue, so much relied upon on behalf of the defendants, as sufficient to dispense with a compliance with the language and meaning of the act.

Peremptory mandamus awarded (*a*).

(*a*) See the preceding case.

COURT OF EXCHEQUER.

In Michaelmas Term, 1841.

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Nov. 3.

SHARPE and Another *v.* THE GREAT WESTERN RAILWAY COMPANY.

A contract between a railway Company and a manufacturer, for the supply of locomotive engines, contained the following provisions: "Each engine and tender to be subject to the performance of the distance of 1000 miles, with proper loads, during which trial Messrs. S. & Co. (the manufacturers) are to be liable for any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for, nor liable to the repair of any breakage or damage whatever, resulting from collision, neglect, or mismanagement of any of the Company's servants, or any other circumstance, save and except defective materials or workmanship. The performance to which each engine is to be subjected to take place within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & Co. shall forthwith be released from any responsibility in respect of the said engine; the balance to be paid on the satisfactory completion of the trial, and release of Messrs. S. & Co. from further responsibility in respect of each engine." It was also agreed that the fire-boxes should be made of copper 7-16ths of an inch thick, and that the best materials and best workmanship were to be used.

ASSUMPSIT for goods sold and delivered, work and materials, money paid, and on an account stated.—Plea, *non assumpsit*. This was an action brought by the plaintiffs, who were makers of locomotive engines at Manchester, to recover the sum of £662, the balance of a bill for the supply of ten engines and tenders to the defendants, at the price of £1840 and £450 respectively. At the trial before *Wightman*, J., at the Liverpool summer assizes, 1841, it appeared that a written contract was entered into, that the engines and tenders should be made according to the specification and drawings furnished by the directors, and were to be delivered at specific periods at the Company's station at Paddington; the copper composing the fire-

One of the engines so supplied performed the distance of 1000 miles within the month; but some months after the fire-box burst, when it was discovered that the copper was reduced to the thickness of 3-16ths of an inch. (It was admitted that it had originally been of the proper thickness, 7-16ths).

Held, in an action for the price of the engine, that the defendants could not give evidence of such defect in the copper, no fraud being alleged; and that, by the terms of the contract, the month's trial, having been satisfactory, released the manufacturers from all responsibility in respect of bad materials and bad workmanship.

boxes to be of the thickness of seven-sixteenths of an inch. The contract also contained the following articles—

3. "Each engine and tender to be subject to the performance of the distance of 1000 miles, with proper loads, during which trial Messrs. Sharpe, Roberts, & Co. are to be liable for any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for, nor liable to the repair of any breakage or damage whatever resulting from collision, neglect, or mismanagement of any of the Company's servants, or any other circumstance, save and except defective materials or workmanship."

4. "The said performance to which each engine is to be subjected is to take place within one month from the day on which the engine is reported ready to start; in default of which Messrs. Sharpe, Roberts, & Co. shall forthwith be released from any responsibility in respect of the said engine."

6. Providing for payment, stipulated, "that the balance is to be paid on the satisfactory completion of the trial, and release of Messrs. Sharpe, Roberts, & Co. from further responsibility in respect of each engine."

A printed specification was delivered by the defendants to the plaintiffs containing the following "General Stipulation":—

"The manufacturer is to deliver, put together, and start the engines, in complete working order, upon the line of the Great Western Railway Company, either at London or Bristol, as may be directed by the Company, and shall be held liable for any breakages that may occur either from bad materials or bad workmanship, until each engine has performed a distance of 1000 miles, with proper loads; at the end of which time, should the engine be perfect, the manufacturer will be relieved from any further responsibility. No deviation from the drawings and specification will be allowed without the consent of the Company; and,

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throughout the whole the best materials and workmanship shall be used."

The engines in question were delivered at the Company's station, and performed the distance of 1000 miles within the month, as specified in the contract, without any defect being discovered in them. Nine months afterwards, the fire-box of one of them having burst, it was found that the copper of which it was made had been reduced in thickness from seven-sixteenths to three-sixteenths of an inch, and that the fire-boxes of the other engines also had been reduced. The plaintiffs refused to repair or replace the fire-boxes, on the ground that the trial of the engines had released them from all further responsibility; and upon the defendants refusing to pay the balance due, the present action was brought.

At the close of the plaintiffs' case, it was admitted, on the part of the defendants, that the copper of which the fire-boxes were composed had originally been of the requisite thickness, and that no fraud or negligence was to be imputed to the plaintiffs, but evidence was tendered to prove that the copper was defective in quality, (which was the cause of the reduction in thickness), and also that the plaintiffs had deviated from their contract, by inserting iron instead of copper rivets in the fire-boxes. This evidence was rejected by the learned Judge, on the ground that, after the trial of the engines, it was too late to object to such defects. The objection to the evidence as to the rivets was afterwards withdrawn, but the defendants' counsel, refusing to rest his case on that ground alone, the jury, under the direction of his Lordship, returned a verdict for the plaintiffs for the amount claimed.

Wortley now moved for a rule to shew cause why a new trial should not be granted on the ground of the improper rejection of evidence and of misdirection.—There is no fraud or negligence imputed to the plaintiffs in this case,

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and it is not contended that the copper was not originally of the requisite thickness. But the construction of the contract taken at the trial was erroneous; it should be taken to apply only to such defects as a month's trial would readily detect. The defect in this instance must have arisen from some latent cause, peculiar to the quality of metal employed; it is attributable perhaps to some chemical influence, over which neither party could have any control, but which might be shewn by the defendants as a defect of materials, and taken advantage of in reduction of damages: *Basten* v. *Butter* (*a*); not by a cross-action, (as formerly), which can only be brought for consequential and subsequent damage, and not original defects, though in goods delivered according to contract or sample: *Mondell* v. *Steel* (*b*); *Jones* v. *Bright* (*c*); *Shepherd* v. *Kain* (*d*). The word "breakage" used in the contract shews that the trial was in contemplation of mechanical defects only; and the purchaser in such case is no more concluded by such a trial from objecting to inherent defects, than a purchaser of a horse, warranted thoroughbred and sound in wind and limb, having permission to make trial of him; if, upon being galloped, he proves to be sound, is precluded by that trial from objecting to his pedigree.

PARKE, B.—The true construction of this contract is, that the trial of a month was to be conclusive as to defective materials and workmanship; but that if the defendants could shew that iron rivets were substituted for copper, or that the copper originally was less than 7-16ths of an inch in thickness, they might avail themselves of the deviation from the agreement. Look at the contract itself: it must have been the opinion of both parties to it,

(*a*) 7 East, 479.
(*b*) 10 L. J., N. S., Exch. 426.
(*c*) 5 Bing. 533.
(*d*) 5 B. & A. 240.

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that the period of a month would determine the sufficiency of the materials and workmanship. The question does not depend on the 3rd section only of the contract, but, coupling that with the 4th section which is not unimportant, it appears that the distance of 1000 miles is to be performed within one month; and, in default of such performance taking place within that time, the plaintiffs "shall forthwith be released from any responsibility in respect of the said engine;" that is, if the trial which takes place within that period proves satisfactory, the plaintiffs are to be released from any responsibility arising from defective materials and workmanship. The general stipulation at the end of the specification confirms this conclusion. The manufacturer is to deliver, put together, and start the engines, in complete working order, upon the line of the Great Western Railway Company, and shall be liable for any breakages that may occur, either from bad materials or bad workmanship, until such engine has performed a distance of 1000 miles, with proper loads; at the end of which time, should the engines be perfect, the manufacturer will be relieved from further responsibility,—that is, if no breakage is found to have occurred. That being so, there seems to be an end of the question. What amounts to bad materials and bad workmanship will always be matter of dispute; and it is plain that the parties intended, by the trial, to put an end to such questions. If the defendants wished to insist upon their present objection, they should have made their contract in different terms. The intention was, that all disputes of this kind should for ever be set at rest; and that if the defendants did not avail themselves of the trial, or the trial proved satisfactory, all inquiry as to defective materials or workmanship should thenceforth be determined. The learned Judge was, therefore, right in the view he took of the case.

It would have been a different thing if a distinct breach of the terms of the contract had been shewn: but no

evidence was given of any violation of the contract; nor did the defendants shew, as it seems they had at first intended, that iron rivets had been substituted for copper. The rule must, therefore, be refused.

GURNEY, B., concurred.

ROLFE, B.—It appears to me that the defendants are seeking to impose a never-ending responsibility on the plaintiffs by their construction of the contract: their argument amounts to this, that although there was to be a trial of the sufficiency of the engines during a month, yet that the manufacturer's responsibility was to endure to the end of time. In that case the trial would have been altogether superfluous.

Rule refused.

COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1841.

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THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY *v.* DANIEL.

THE SAME *v.* DE MEDINA.

Before the passing of a railway act, A. signed the subscribers' agreement and parliamentary contract for —— shares, and paid a deposit of £—— per share, upon which scrip certificates were delivered to him, which contained a notice that they were not transferable before the act should pass.

DEBT for two calls in the above undertaking. Pleas—1. *Nunquàm indebitatus;* 2. That the defendant was not nor is a proprietor of the said shares.

The cause was tried at the Guildhall Sittings after *Hilary* Term, 1840, before *Williams*, J., when a verdict was found for the plaintiffs for the full amount claimed, subject to the opinion of the Court on the following case:—

The case stated the passing of the acts 6 Will. 4, c. lxxvii. (21st June, 1836), and 1 Vict. c. xxiv. Prior to the passing

The act passed, (6 Will. 4, c. lxxvii.) containing the following provisions:—By sect. 5, the mode for a party to become a subscriber is by subscribing the parliamentary contract, or becoming an assignee afterwards, according to the statute. Sect. 138 requires the names of proprietors from time to time to be entered in a book, to which their common seal is to be affixed, and provides for the delivery of a sealed ticket to every registered proprietor on demand. And sect. 148 authorizes proprietors of shares to sell them, by conveyance in writing to be kept by the Company, who are to enter in a book a memorial of the transfer, and make an indorsement of such entry on the deed of transfer, and of the transfer on the certificate of each share sold; and until such memorial shall have been made and entered, the seller is to be liable for calls, and the purchaser not to be entitled to any privileges.

After the passing of the act, the Company made out a list of proprietors, in which A.'s name was inserted as proprietor of —— numbered shares. They also issued circulars requesting to know what numbers the several proprietors intended to retain. In reply, A. stated that he had disposed of the numbers standing in his name; and soon afterwards the defendant sent in the scrip certificates which had been delivered to A., *claiming to be registered as a proprietor* in respect thereof. He accordingly received from the Company a receipt for the scrip certificates, with a notice, that they would be exchanged for sealed certificates on demand. The defendant never applied for or received them; nor was any regular transfer made by him or A., or any memorial of transfer entered, as required by the act.

Held, that, notwithstanding the provisions of the act necessary to make him a proprietor had not been complied with, the defendant, by his representation and claim to be registered, had precluded himself from taking advantage of such objection, and was therefore liable for the calls on his shares.

And that this, being matter of estoppel *in pais*, might be used as evidence in answer to the defence, without being pleaded.

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of the first act, the promoters of the undertaking signed a subscribers' agreement and a parliamentary contract or engagement, paying also a deposit of 2*l.* 10*s.* per share; and upon their executing these instruments scrip certificates were delivered to each subscriber, according to the number of shares for which he subscribed. The defendant never signed or executed either the subscribers' agreement or parliamentary contract.

(Copy Scrip Certificate.)

"Cheltenham and Great Western Union Railway

"Certificate.

"£100 share (deposit paid, 2*l.* 10*s.*) No. ——.

"The holder of the above share having signed the parliamentary engagement, and having agreed to pay all calls in respect thereof, is the proprietor of one share in the above undertaking.

"This certificate not transferable previous to the passing of the act.

"1st December, 1825. ——— } Two of the
"Entered. ——— } Directors."

These certificates, notwithstanding the notice appended to them, passed from hand to hand, and became common subjects of sale; so that, at the time the first act passed, a large number of them were in the hands of other than those who had originally paid the deposit, and signed the subscribers' agreement, and parliamentary contract.

After the first act passed, the Company made an alphabetical list of proprietors. The name of Dr. Boisragon was entered therein in respect of the shares numbered from 6330 to 6339, both inclusive, and the name of Sir R. Wolseley in respect of those from 6598 to 6607, both inclusive, they being respectively the original subscribers for the said shares, and having executed the subscribers' agreement and parliamentary contract in respect thereof.

The plaintiffs having issued a printed circular to the

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subscribers, with a memorandum at the foot requesting them to fill up and sign the circular in presence of a witness, and return it to the secretary within ten days, and to specify the numbers retained, received in answer the following letters:—

(1) "Cheltenham, July 7th, 1836.

"Sir,—I now beg to transmit the numbers of the scrip for shares in the Cheltenham and Great Western Union Railway now in my possession, and as follows:—Fifty shares, being my qualification as director, viz., Nos. 6340 to 6367 and Nos. 5372 to 5393, inclusive.

"A. Merrick, Esq., Sec^y. &c. H. C. BOISRAGON."

(The above only specifies the shares which were retained by Dr. B.; those numbered 6330 to 6339, originally subscribed for by him, had been disposed of by him previously.)

(2) "Cheltenham, July 15th, 1836.

"Sir,—I beg to acquaint you that I have parted with the shares for which I subscribed the contract deed, and therefore renounce all title to be registered as a proprietor in respect thereof, being thirty shares numbered 6578 to 6589, and 6590 to 6607. "R. WOLSELEY.

"A. Merrick, Esq., Sec^y. &c."

The above letters are the only documents to shew that Dr. B. and Sir R. W. had given up the shares, the calls upon which are the subject of the present action. The Company, on the 16th September, 1836, received a letter from the defendant, accompanied by the scrip certificates delivered to the original subscribers, stating that, holding twenty shares of the Cheltenham and Great Western Union Railway Company, he claimed to be registered as a proprietor in respect of the following certificates, viz. from No. 6330 to 6339, No. 6598 to 6607; and he then received from the Company a receipt for the said twenty

scrip certificates, with a notice that certificates under the seal of the Company would be delivered in exchange for the receipts on the completion of the register.

The defendant never applied for or received any certificates under the seal of the Company in exchange for his scrip certificates. His name was entered and registered as proprietor of the said twenty shares in a book or register of shareholders, which was compiled by the Company, and to which the seal of the Company (under sect. 138) was affixed on the 3rd November, 1837. The calls, the amount of which were sought to be recovered in this action, were the 4th and 5th calls upon the said twenty shares, and were duly made and advertised in the mode prescribed by the act. The defendant paid the three first calls. The 4th and 5th were made after the register was sealed, viz. on the 21st March and 31st August, 1839. No transfer or conveyance of the above shares, or any of them, to the defendant or any other person, was ever made or executed, by the defendant, or by Dr. Boisragon, or Sir R. Wolseley, pursuant to sect. 148, nor was any memorial of any transfer or sale of the said shares, or any of them, made or entered pursuant to that section.

The question for the opinion of the Court is, whether, at the time the said 4th and 5th calls were made, the defendant was a proprietor of the said twenty shares within the meaning of the said act, and liable for those calls. The Court is to be at liberty to draw any inferences which the jury ought to have drawn (*a*).

(*a*) The material sections of the act (6 Will. 4, c. lxxvii.) are the lowing:—

Sect. 1 declares the Company to be composed of the individuals therein named, "and of all other persons who have subscribed, or who shall hereafter subscribe towards the undertaking, and their several executors, administrators, and *assigns*."

Sect. 5, reciting that upwards of £600,000 had already been subscribed for by several persons under a contract binding themselves, their heirs, executors, administrators, and *assigns*, for the payment of the several sums by them sub-

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Cresswell (*Cripps* with him), for the plaintiffs (*a*).—When a party has done an act which induces the Com-

(*a*) Before Lord *Denman*, C. J., *Williams*, *Coleridge*, and *Wightman*, Js.

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scribed for, enacts that the whole £750,000 shall be subscribed for in like manner before any of the compulsory powers for taking land shall be enforced.

Sect. 6 provides for the production of the subscription-deed to a magistrate.

Sect. 138 requires the Company, "at their first or some subsequent general meeting, and afterwards from time to time as occasion may require, to cause the names of the several corporations, and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and, after such entry made, to cause their common seal to be affixed thereto, &c.; and the said Company shall from time to time cause a certificate or ticket with the common seal of the said Company affixed thereto to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, such proprietor paying to the said Company the sum of 2*s.* 6*d.*, and no more, for every such certificate or ticket; and such certificate or ticket shall be admitted in all Courts whatever as *primâ facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein specified, but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof;" and the clause gives a form of a certificate.

Sect. 148 declares, "that it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions therein mentioned." The clause then gives the form of conveyance (which is to be under seal), and proceeds to enact, that, "on every such sale, the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or by some secretary or clerk of the said Company, who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer; and the said Company, or the secretary or clerk as aforesaid, are hereby required to make such entry or memorial accordingly,

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pany to treat him as an owner of shares, he cannot deny that he is so. That is evident from the case of *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock* (*a*), which is founded on *The London Grand Junction Railway Company* v. *Freeman* (*b*). Here the Company have registered the defendant at his request. He has paid three calls, one voluntarily, the others after action brought, and he cannot afterwards take nice objections upon the construction of the act. The fact of his not having a certificate, under sect. 138, could not affect the question of his being a proprietor or not. He has a right to one if he pleases.—(Here he was stopped by the Court.)

Peacock, contrà.—This act (6 Will. 4, c. lxxvii.) contains clauses which are not usually found in such statutes. By sect. 5, a party can only become a subscriber by subscribing the parliamentary contract, or being a regular assignee afterwards according to the provisions of the act. In *The London Grand Junction Railway Company* v. *Freeman* (*b*), the shares had been transferred before the act passed, and there was nothing to restrain such a transfer in scrip. Then there was no notice to the defendant that his name has been registered. [Lord *Denman*, C. J.—That is not necessary, if so, the negligence of a proprietor to register would always protect him from

(*a*) Antè, p. 522. (*b*) Antè, p. 468.

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and, on demand, to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser for his security; and such indorsement, being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of any such share paid to him, nor any vote in respect thereof as a proprietor of the said undertaking."

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liability.] The Company had no power to allow him to become a shareholder contrary to the provisions of sect. 138, which only gives them power to enter the names of *shareholders*. In *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock* (*a*) there had been a transfer. [*Wightman*, J.—An irregular transfer.] If such a transfer as this is sufficient, no conveyance would ever be necessary. A claim to participate in profits would be an estoppel, but here there is no such claim. [*Wightman*, J. —You say they ought to have gone through the form of registering and making parties transfer, and could not admit the party at once, *per saltum*.] It is not sufficient to inscribe in a register the name of a transferee. [Lord *Denman*, C. J.—How do you distinguish this case from *The London Grand Junction Railway Company* v. *Freeman?* (*b*).] There the Company might not have been aware that the defendant was not a shareholder, but here they bind themselves by a contract (the notice at the foot of the scrip certificates) not to transfer before the act should be passed, so that in this case the Company must have known there was no transfer. [Lord *Denman*, C. J. — He represents himself as a proprietor afterwards.] The register is only *primâ facie* evidence, and the Company must have known he was not so.

Lord DENMAN, C. J.—It is impossible to get over the authority of the case of *The Sheffield, Ashton-under-Lyne, and Manchester Railway Company* v. *Woodcock* (*a*), that a party cannot, by his own conduct, change his liability at his pleasure. In my opinion the judgment there clearly settles this case; all the machinery, which the legislature renders necessary to constitute a member, is, in this instance, dispensed with by the conduct of the parties.

Judgment for the plaintiffs.

(*a*) Antè, p. 522. (*b*) Antè, p. 468.

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THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY CO. v. DE MEDINA.

THE SAME *v.* DE MEDINA.

THIS case was precisely similar to the former, except that the defendant had paid the calls in question on twenty of the thirty shares which he held, and had written to the Company requesting time for payment of the remainder, which was allowed him; he subsequently sold the twenty shares on which the calls had been paid, to one Kilvert, and on the 31st March, 1838, executed a deed of transfer to him, a memorial of which was entered in a book kept for that purpose by the plaintiffs. The defendant never paid the 1st, 2nd, or 3rd calls upon the ten shares which remained registered in his name. There was no entry in any books of the Company of a transfer of the shares from the original subscribers to the defendant.

Barstow, for the defendant, was called upon by the Court to distinguish this case from the former.—The issue in this case is, was this person a proprietor or not? The rights of these parties depend altogether upon the provisions of the act, and they not having been complied with the defendant is not estopped from saying the original subscriber is a member liable to their calls. Sect. 148 shews that until an actual transfer, as prescribed by the act, the seller remains liable. The fact of the Company having put another party upon the register does not discharge the former. [Lord *Denman*, C. J.—One party may, perhaps, make himself liable, though the other be not discharged.] An essential part of estoppel is mutuality. There is no mutuality, as the defendant could not claim dividends; nor is the matter of estoppel replied.

Cresswell, for the plaintiffs, cited *Pickard* v. *Sears* (*a*) and *Coles* v. *The Bank of England* (*b*).

(*a*) 6 Ad. & E. 469. (*b*) 2 P. & D. 521.

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Lord DENMAN, C. J.—The same doctrine has been adopted in several cases, that an estoppel *in pais* is a matter of evidence, and need not be pleaded (*a*). The conduct of parties frequently affords such evidence, as the not inserting a debt in a schedule, that none was owing. There is no distinction between the two cases.

Judgment for the plaintiffs (*b*).

(*a*) Com. Dig., Pleader, (S. 5), Estoppel, (A. 3).

(*b*) See *The Cromford and High Peak Railway Company* v. *Lacey*, 3 Y. & J. 80.

COURT OF QUEEN'S BENCH.

In Michaelmas Term, 1841.

Nov. 24.

THE QUEEN *v.* THE EASTERN COUNTIES RAILWAY COMPANY.

By a railway act, (6 & 7 Will. 4, c. cvi.) a Company were empowered (s. 9), *inter alia*, "to raise or lower certain roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway, doing as little damage as may be in the execution of the powers hereby granted, and making full satisfaction *in manner hereinafter mentioned*, to all persons interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted." Sect. 26 provides, "That the owners or occupiers of any lands, through, over, or upon which the railway is intended to be made, may agree to accept satisfaction for the value of such lands, and also compensation for any damage by them sustained by reason of the severing or dividing of such lands." And by sect. 29, "*if any of the parties entitled to receive such purchase-money, satisfaction, recompense or compensation as aforesaid*, shall refuse to accept such purchase-money, &c., as is offered by the Company, or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands, cannot be made," a jury is to be summoned to assess the purchase-money; "and also the sum of money to be paid by way of satisfaction, recompense, and compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands."

The Company had lowered a road in front of a piece of land, and thereby injured its value, by impeding the access to it, and causing the necessity of additional fences, &c., but they had not actually touched any part of the land.

Held, that the words of the 29th section do not necessarily refer to the persons mentioned in the 28th section alone, but may apply to and include cases mentioned in the 9th section, and that the Company were bound to issue their warrant, to summon a jury to make compensation for the damage to the land in question.

Semble, that the *mandamus* should state *specifically* the nature and cause of the injury complained of, and not in the general words of the act. And the Court allowed the writ to be amended accordingly.

IN *Hilary* Term, 1840, *Butt* had obtained a rule *nisi*, calling upon this Company to shew cause why a writ of

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mandamus should not issue to them, to issue a warrant to the Sheriff of Middlesex to impanel, summon, and return a jury for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid by the said Company by way of recompense or compensation for the damage which has been sustained by J. Collingridge, in consequence of certain works of the said Company in the execution of the powers of the several acts of Parliament for making the said railway.

He moved upon affidavits, which stated that J. C. has been for several years past, and is assignee of a term of 99 years, under an indenture of lease dated 27th August, 1808, and made between H. P. and W. T., of a piece of land situate, lying, and being in the parish of St. Mary Stratford, Bow, in the county of Middlesex, bounded &c., and then, or late in the tenure and occupation of Mr. Giles, subject to the yearly rent of £110, payable quarterly, and to the covenants and agreements in the said indenture of lease contained. That the said covenants, &c., have been always observed and kept, whereby and by means whereof J. C. might and should still have continued in the quiet possession of the said premises.

That by the 36th section of an act of Parliament (6 & 7 Will. 4, c. cvi.) (*a*), it was directed, "that the said Company

(*a*) The material sections of the act are as follows:—

Sect. 9 enacts, "That, for the purposes, and subject to the provisions and restrictions of this act, it shall be lawful for the said Company, their agents and workmen, and all other persons by them authorized, and they are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate, for the purposes of this act, such parts thereof as they are by this act empowered to take or use, and in or upon such lands, or any lands adjoining thereto, to bore, dig, cut, embank, and sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein, or otherwise, in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the said railway and other works by this act authorized, or which may

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should not be obliged to take notice of any complaint, by any party, of any injury sustained, or supposed to be sus-

obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the full and true intent and meaning of this act; and also to make or construct upon, across, under, or over the said railway or other works, or any lands, hills, valleys, streets, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches, and fences, and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engines, and other buildings, machinery, and other conveniences, and works of all descriptions, as the said Company shall think proper; and also to alter the course of any rivers, canals, brooks, streams, or water-courses, for such time as may be judged necessary by the said Company for constructing or maintaining any of the works aforesaid; and also to divert or alter the course of any rivers or streams of water, roads, or ways, or to raise or lower any such rivers or streams, roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the said railway, and to make drains or conduits into, through, or under any lands adjoining or near to the said railway, except houses or buildings, for the purpose of conveying water from or to the said railway; and also from time to time to alter, repair, or discontinue the before-mentioned works, or any of them, and to substitute others in their stead, and generally to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the said railway and other works by this act authorized; they, the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted; and the said Company making full satisfaction, in manner hereinafter mentioned, to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted; and this act shall be sufficient to indemnify the said Company and all other persons for what they or any of them shall do by virtue of the powers hereby granted, subject nevertheless to such provisions and restrictions as are hereinafter mentioned and contained," &c.

Sect. 28 enacts, "That all persons, corporations, and other parties by this act capacitated to sell and convey any lands, or to enfranchise lands of copyhold or customary tenure, or to release lands from rents and other incumbrances charged thereon, and the respective owners and occupiers of any lands, through, over, or upon which the said railway or other works hereby authorized are intended to be made, or of any share, estate, or interest in such lands, may agree to accept and receive, and may, subject to

tained, unless notice of the injury shall have been given in pursuance of the directions contained in the said act."

such restrictions as in this act are contained as to the payment thereof, accept and receive satisfaction or recompense for the value of such lands, or of the interest therein by them conveyed, and also compensation for any damage by them sustained by reason of the severing or dividing of such lands, or by the apportionment or release of rents, and also for and on account of any damage, loss, or inconvenience which may be sustained by such persons, corporations, or other parties, by reason of the taking thereof, or by reason of any of the works by this act authorized, or of the execution of the powers hereby granted, in such gross sums as shall be agreed upon between the said owners (including persons hereby capacited as aforesaid) and occupiers respectively, and the said Company; and in case the said Company and such parties respectively shall not agree as to the amount or value of such purchase-money, satisfaction, recompense, or compensation, the same respectively, or either of them, concerning which they do not so agree, shall be ascertained and settled by the verdict of a jury, if required, as hereinafter is directed."

Sect. 29, "For settling all differences which may arise between the said Company and the several owners and occupiers of, or persons interested in any lands, which shall or may be taken, used, damaged, or injuriously affected by the execution of any of the powers hereby granted;" enacts, "That, if any person, corporation, or trustee so interested or entitled and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said Company as to the amount of such purchase-money or satisfaction, recompense, or other compensation as aforesaid, or if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept such purchase-money, &c., as aforesaid, as shall be offered by the said Company, and shall give notice thereof," &c., a jury is to be summoned in the manner therein provided; and such jury shall upon their oath, &c., "inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, except for such interest therein as shall have been of right purchased by the said Company from any other person, and also the sum of money to be paid by way of satisfaction, recompense, or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands whereof any such person as aforesaid shall be seised, possessed of, or interested in, which satisfaction, recompense, or compensation for such damage or loss shall be inquired into, and assessed separately and distinctly from the value of the lands so to be taken or

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And that J. C. hath sustained damage, loss, and injury, by reason and in consequence of the execution of the powers of the said act, and that the works occasioning such damage &c. commenced in or about the year 1838, and ceased in or about April, 1839.

The affidavits then set out letters from J. C. to the Company, containing the following claim for compensation: "on account of damage done to a leasehold estate situate &c., by reason of the Company's works having destroyed the building frontage, and reduced the value of the property to that of arable or pasture land, (specifying the term, length, and depth of frontage, deducting 1-4th for the probable delay in letting for building, and value of land as pasture, and the amount of claim at 3*s*. per foot, worth, at 5 per cent., 19¼ years' purchase, 714*l*. 11*s*.). "The Company is also hereby required to build retaining walls, so far as may be necessary to keep up and secure the land against the present cutting, and to place a good and sufficient palisade fence upon the wall, and in continuation of the line thereof, so as properly to inclose all the estate not included in the road."

used as aforesaid, and the said sheriff, under-sheriff, coroner, or other person shall give judgment accordingly."

Sect. 36 enacts, "That the said Company shall not be obliged, nor shall any jury, to be summoned by virtue of this act, be allowed (without the consent of the said Company) to receive or take notice of any complaint to be made by any party for any loss or injury by him sustained, or supposed to be sustained, in consequence of the execution of any of the powers of this act, unless notice in writing by or on the behalf of the corporation or person making such complaint, stating the nature, extent, and particulars of such loss or injury, and the amount of compensation claimed in respect thereof, shall have been given by such corporation or person to the said Company ten days before the summoning of such jury, and within the space of six calendar months after the time of such supposed loss or injury having been sustained, or after the sustaining, doing, or committing thereof shall have ceased, so that the Company shall not be chargeable with, or liable to any amount of continuous damage for any time exceeding six years prior to the making of such claim and giving such notice."

They also stated, that no offer of compensation had been made by the Company; that a formal notice and requisition was served upon them, January 15, 1840, and that no communication had been since received from them.

R. Alexander and *James* shewed cause (*a*).—The affidavits are silent as to how the mischief complained of was done. The question will be the construction of sect. 29, to see whether the executors have a right to call upon the Company to summon a jury. Sect. 9 speaks of powers to enter land upon making compensation; it expressly refers to proceedings thereinafter set out, that is, in sects. 28 and 29. Sect. 28 gives a power for preventing lawsuits, by making satisfaction in manner directed in sect. 29. The two must be taken together; and it is clear, on the construction of the 29th, that the jury are to be summoned only in the case of persons whose lands are touched by the Company; not where land, situated perhaps at the distance of 500 yards, may have been injuriously affected; that is a subject for an action at law. Sect. 36 has nothing to do with the question. [Lord *Denman*, C. J.—If it was done in the execution of the powers of the act, that prevents any action at law, unless there be malice or negligence.] The party here has an action, his interests are not immediately connected with possession, as in *Jones* v. *Bird* (*b*). [Lord *Denman*, C. J.—That was a case of negligence, which cannot be justified under the act; we assume this has been done with proper care, and the only question is whether the land has been injuriously affected.] There is no case reported in which, under acts of this kind, compensation has been given to any but an occupier or an owner of land, or of an easement, as in *Thicknesse* v. *The Lancaster Canal Company* (*c*).

(*a*) Nov. 12th 1840, before Lord *Denman*, C. J., *Williams*, and *Coleridge*, Js.

(*b*) 5 B. & A. 837.

(*c*) 4 M. & W. 472.

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[*Coleridge*, J.—Are you prepared to say that all cases of consequential damage are out of sect. 29. Suppose they cut off a spring of water? (*a*).] It is submitted that a jury, under this act, could not consider it, and there would be no hardship on the complaining party, as he would have a right of action. The real point the Company wish to raise is, whether they are bound to make compensation for consequential damage to lands not taken.

Butt, *contrà*.—It has been expressly decided that a Company is bound to make compensation, though the lands are not used, or directly touched, or interfered with, provided they have been injuriously affected: *Rex* v. *The Nottingham Old Water-works Company* (*b*). (Here he was stopped by the Court.)

Lord DENMAN, C. J.—The Company may return that they have done nothing injuriously affecting the interest of these parties, or, as was done in a former case, upon the face of the return, they are at liberty to question the validity of the *mandamus*; there it was said that the writ was wrong. We should never decide such a question as this on affidavits. The argument on the construction of the act is open upon the return.

Rule absolute.

The *mandamus* issued, tested 12th November, 4 Vict. (1840), which, after reciting portions of the 1st, 9th, 28th, and 29th sects. of the act (6 & 7 Will. 4, c. cvi), suggested as follows:—"Whereas, John Collingridge, of &c., for several years last past has been and still is assignee of a certain lease for a term of 99 years, dated &c., of a certain leasehold estate, situate &c., then or late in the tenure or occupation of Mr. Giles; [and (*c*) whereas, before and at

(*a*) See *Regina* v. *The North Midland Railway Company*, antè, p. 1.

(*b*) 6 A. & E. 355.

(*c*) The *mandamus* was amended by the insertion of the words between brackets. See post, p. 747.

the time of the sustaining of the damage, loss, and injury hereinafter mentioned, part of the land of the estate was bounded on one side thereof by a certain public road or highway called or known as the Fairfield road, and was on a level with the same; and whereas you the said Company, in making the said railway, and in the execution of the works so authorized to be done by you as aforesaid, and in order to carry the said railway over the said road, have altered and lowered the same to a great depth in front of a great part, to wit, in front of 290 feet of the said land of the said J. C., and thereby the said land hath been and is greatly injured and deteriorated in value, and the access thereto from the said road has been greatly impeded, and by reason of the declivity from the said land to the said road it hath become necessary to make additional fences to protect and keep in cattle depasturing on the said land, and to cut down and level certain parts of the said land against the said road, for the beneficial enjoyment and occupation of the same, and the said J. C. hath been and is, by reason of the premises, otherwise greatly injured and damnified]; and whereas the said J. C., as such assignee, hath sustained great damage, loss, and injury in his said estate, by reason [of (*a*) the matters and things hereinbefore mentioned, and otherwise, by reason] and in consequence of certain works done by you, the said Company, in the execution of the powers by the said act granted; and whereas the said J. C., under the provisions of the said act of Parliament, was and is entitled to accept and receive recompense and compensation from you the said Company, for the damage, loss, and injury sustained by him by the means aforesaid." The *mandamus* then recited the notice dated 10th June, 1839, (being within six calendar months next after such damage, loss, and injury had been sustained by the claimant), the inability to agree,

(*a*) See post, p. 747.

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and the requisition to the Company, dated 16th January, 1840, to issue their warrant to the sheriff to summon a jury, and that the Company had made no agreement as to the sum of money to be paid to J. C., and had wholly neglected and refused to issue such warrant. The writ then commanded the Company to issue their warrant to the sheriff of Middlesex to summon a jury accordingly, for the purpose aforesaid.

Return, filed 11th January, 1841, by the Eastern Counties Railway Company:—"That we, acting under the provisions and powers of an act (7 Will. 4, c. cvi), have made a railway, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, and over the land delineated upon the plans, and described in the books of reference containing the list of the names of the owners, &c. of such lands, and which said maps and plans and books have been duly deposited with the several clerks of the peace, &c.; and which said railway commences at &c., and passes, among other parishes, through and into the parish of St. Mary, Stratford-le-Bow, such parish being mentioned and alluded to in the said act as the parish through which the said railway was to go and pass, and being also the parish in which the said leasehold estate and premises described and set forth in the said writ are situate, and which said railway at that point is complete and finished. And that the lands in the line or course of the said railway, and through, over, and upon which the said railway is made, are correctly and properly set forth and described in the schedule to the said act annexed, as the lands through, over, and upon which the said railway was to be and is made; and that the leasehold estate, lands, and premises of J. C., in the said writ named, and therein described and set forth, and of which he is therein stated to be the assignee, are not set forth or mentioned in the said schedule to the said act annexed, nor were they, or any part thereof, required for the purposes of the said

railway. And that we have not, under any of the powers and provisions of the said act, entered into and upon the lands and premises and leasehold estate in the said writ mentioned, and of which the said J. C. is therein stated to be possessed, nor on any part or portion thereof, nor have we set out and appropriated them, nor any part nor portion of them, for the purposes of the said railway, nor have we taken or used the same, or any part thereof, nor have we cut, embanked, soughed, or removed, or laid, nor have we used or manufactured any earth, stone, trees, gravel, or sand, or any other materials or things whatever, in and upon or out of the said lands and premises and leasehold estates of the said J. C., nor any part &c., in the execution of the powers of the said act for the making, maintaining, altering, repairing, or using the said railway, or other our works, nor have we made or constructed any works whatever in, over, or upon the said lands, &c., under the powers and provisions and in the execution of the said act or otherwise. And that the said J. C. is not the owner or occupier of, nor is a person interested in any lands, through, over, or upon which the said railway or any other works connected therewith are made or constructed, nor of any lands taken or used by us the said Company in the execution of any of the powers granted by the said act. And that, for the causes and reasons above set forth, and because it is not stated and shewn to us the said Company, nor is it stated and shewn in the said writ, by the said J. C., that his lands or estate or premises have been entered upon or touched or taken and used, or in any manner interfered with by us, in the execution of the powers of the said act, we have *not* issued our warrant to the sheriff of the county of Middlesex for the purpose in the mandatory part of the said writ mentioned, in manner and form as by the said writ we are commanded, &c.

The points marked for argument by the prosecutor were, that he is entitled to receive recompense and compensa-

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tion for damage occasioned to his land by reason of the works done by the Company in the execution of the act for making the railway, although such damage did not arise from any thing done by the Company in or upon the land itself. That the return merely states that the land was not authorized to be taken or used by the Company, and that they did not take or use it, nor enter upon nor do any direct injury to it, but does not state that they did not cause damage to it by their works. That it is, therefore, argumentative, and no sufficient answer to the *mandamus*, and does not contain any legal excuse for not issuing their warrant to the sheriff. That if the Company intended to deny that any damage has been occasioned to the land of the prosecutor (as alleged) by the execution of their works, they ought to have made such denial in direct terms, so that issue could have been joined upon such denial.

A *concilium* having been obtained, and the case inserted in the Crown paper,

Butt, in support of the *mandamus* (*a*), cited the cases of *Rex* v. *The Nottingham Old Water-works Company* (*b*); *Rex* v. *The Exeter Improvement Commissioners* (*c*); *Thickness* v. *The Lancaster Canal Company* (*d*); and *Jones* v. *Bird* (*e*).

Sir *W. Follett*, contrà, objected that there was no specific statement in the writ of the nature of the injury, and that if such a statement as the present were sufficient, the proprietor of every house, however distant from the railway, would be entitled to come to this Court for compensation for the most trifling annoyance or injury. The cases cited all turned upon particular statutes.

(*a*) June 5th, 1841. Before Lord *Denman*, C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

(*b*) 6 A. & E. 355.

(*c*) Not reported. See post, p. 748.

(*d*) 4 M. & W. 472.

(*e*) 5 B. & A. 837.

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Butt, in reply.—[Lord *Denman*, C. J.—Is there any case in which it has been held sufficient to use these general words, without stating the manner in which the damage is done?] This is the invariable course in the Crown office. [Lord *Denman*, C. J.—How do we know what you mean by it; your complaint may be, that it is injuriously affected because it will take away the custom of a public-house.] It has been decided in several cases, that the question of damage is for the jury, in case the writ should go. [Lord *Denman*, C. J.—Yes, if we see there is a case for a jury.] This is the form adopted in the case of the Exeter Improvement Commissioners. We have followed the words of the act, and have had no suggestion that such a point was intended to be raised.

Lord DENMAN, C. J.—Generally speaking, the words of the act will describe direct damage clearly within it. This may be mere matter of form, and yet the jury may feel themselves called upon to award something. In the London Dock case there was a statement of the nature of the injury, which we held was not the kind of injury for which a *mandamus* can go. I, for my part, should not like to see a writ in this form. If upon consideration you think this will do, you may let it stand; or if you choose to amend by specifying the injury, you may do so.

The amendment was made by inserting the words between brackets.

Butt, in the *Michaelmas* Term following (*a*), moved for a peremptory *mandamus*, and to quash the return.—The amendments which have been made to the writ distinctly raise the point, whether, under this act, a party is entitled to compensation for damage done to land, no part of which is taken or used by the Company. The Company

(*a*) Nov. 13th, 1841. Before Lord *Denman*, C. J., *Williams*, *Coleridge*, and *Wightman*, Js.

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have done what the 9th section entitled them to do, namely, lowered a road, and therefore have the protection of their act. In such cases sect. 29 gives two modes of compensation, 1st, where the land is purchased and taken; 2nd, where damage is done to land not purchased or taken. In the case of *Rex* v. *The Nottingham Old Waterworks Company* (*a*), the return was similar to this; the words of that act alluded to damage, "not before or hereinafter provided for," which are not in this; but there are the words "taken, used, or injured." It was suggested, when this writ issued, that the remedy was by action, but it is conceded that the Company have not been guilty of negligence, and have done all correctly; still however they must make compensation for an injury, whether direct or consequential. *Thicknesse* v. *The Lancaster Canal Company* (*b*) is also in point, and *Rex* v. *The Commissioners of the Thames and Isis Navigation* (*c*). [Lord *Denman*, C. J. —I do not think that case can ever be authority under any other act of Parliament; the justices there were made arbitrators whether an injury was done or not, and we thought we had nothing to do with that.] In *Bell* v. *The Hull and Selby Railway Company* (*d*), Lord *Abinger*, C. B., says: "We think, however, that such is not the right construction of the act, (that the clause in question had reference only to a *bodily* injury to the wharf); a liberal interpretation ought to be put upon clauses of this kind." There are many other analogous cases, but one in particular, not reported, which occurred in 1837, where the Exeter Improvement Commissioners, in cutting down a road, left the houses at the original level, so that they were obliged to make steps to them. The commissioners returned, that they had only interfered with the roadway, but the Court held that the injury came within the spirit

(*a*) 6 A. & E. 355.
(*b*) 4 M. & W. 472.
(*c*) 5 A. & E. 804.
(*d*) Antè, p. 286.

and words of the act, which mentioned, "any other matter or thing done" (*a*). The case of *Rex* v. *The Hungerford Market Company* (*b*) shews that a liberal construction should be given to such statutes.

Sir *W. Follett*, Solicitor-General, (*James* with him), contrà.—The applicant, in this case, is not entitled to compensation. If so, every owner of land on or near the line may claim it. This case depends on the general clauses of the act only, which distinguish it from the cases cited, in all of which the decision turned upon the wording of some particular section. The nature of the injury here is important. [Lord *Denman*, C. J.—What is the meaning of *lands* being injuriously affected. Is not that the occupation of them?] The act only applies to those persons whose lands are taken, who alone are entitled to compensation. *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (*c*), and the authorities collected in *Boulton* v. *Crowther* (*d*), shew that the Company are not liable for such consequential injury. The Exeter Improvement case turned entirely on the construction of one particular clause giving compensation for any thing *done*. In this act there is no particular clause. The 28th section relates to the owners of lands, and the words of the 29th apply only to lands mentioned in the 28th. There is no provision for a jury giving a verdict except when land is purchased; then the value and consequential damage are to be assessed separately and distinctly. These Companies are identified with the public, in the same way as trustees of a public highway; the legislature gives them extraordinary powers to interfere with private rights, on the ground of its being for the public benefit, and no

(*a*) And see *Regina* v. *The Manchester and Leeds Railway Company*, antè, Vol. 1, p. 523.
(*b*) 1 A. & E. 668, 676.
(*c*) 4 T. R. 794.
(*d*) 2 B. & C. 703. See *Sutton* v. *Clarke*, 6 Taunt. 34.

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other; and when it thinks right, it introduces clauses for consequential damage, as in *Rex* v. *The Commissioners of the Thames and Isis Navigation* (*a*), for cutting off the water from a mill. The acts relating to the Blackwall and Greenwich Railways have such clauses; and see *Rex* v. *The Nottingham Old Water-works Company* (*b*), and *Rex* v. *The London Dock Company* (*c*). In *Thicknesse* v. *The Lancaster Canal Company* (*d*), the question was of an easement over land *purchased* by them, that is the distinction; and the words of that act are, "interested in any way" in which a right of way is included. In the Hull and Selby Railway Act there was also a special clause; and see *Lord Oakley* v. *The Kensington Canal Company* (*e*). [Lord *Denman*, C. J.—We are not fond of referring to that case; somehow or other effect was there given to a fraud.] The only clauses in this act directing compensation are the 28th and 29th, and they do not apply to such an injury, or one of so trivial a nature as this.

Butt, in reply.—The amount of injury is unimportant, or the fact of no injury might have been returned, as in *Rex* v. *The North Midland Railway Company* (*f*). The 9th sect. distinctly contemplates injury to land not to be taken, which is to be compensated for "in manner hereinafter mentioned," that is in the general jury clause (sect. 29). [*Coleridge*, J.—Those words seem to enact the 29th into the 9th sect.] In pursuing their powers of diverting or altering under sect. 9, they have done damage; and if the legislature did not contemplate such damage, they would have stopped at the words "taken or used," but they go on to say, "injuriously affected." Sect. 36 applies only to loss or injury, not to the case of lands taken, &c.; and in that case the notice and time in which complaint is to be made

(*a*) 5 A. & E. 804.
(*b*) 6 A. & E. 656.
(*c*) 5 A. & E. 163.
(*d*) 4 M. & W. 472.
(*e*) 5 B. & Ad. 138.
(*f*) Antè, p. 1.

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is different from the 27th. In the London and Blackwall Railway Act there was no such clause, they were limited to injury to estate, or interest. Under this 9th sect. there is a power to dig and take stones: that is not a purchase of land, but compensation is to be made for that also "in manner hereinafter mentioned." *Boulton* v. *Crowther* (*a*) and *The Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (*b*), are authorities against the defendants, and *Bell* v. *The Hull and Selby Railway Company* (*c*) is a similar case to this, substituting *land* for *wharf*. A power is given by this act, which deprives the party injured of a right of action, and he has no means of making use of the act as a remedy, but by distributing one of the clauses, which must therefore be read *secundùm subjectam materiam*. These Companies are said in *Rex* v. *The Commissioners of the Thames and Isis Navigation* (*d*) to be trustees for the benefit of the public.

Lord DENMAN, C. J.—You contend that instead of the words "injuriously affected" in the 29th sect., the words of the 9th sect. are to be supposed to be actually introduced, and that we ought so to construe the 29th as to make it applicable to all the cases of injury previously mentioned. We think we ought to do so, if we can, and will look into the clauses of the act and consider.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—The question in this case came before us on a return to a *mandamus*, directing the Company to summon a jury, to inquire into the injury alleged to have been sustained by the applicant, by reason of the lowering of a

(*a*) 2 B. & C. 703.
(*b*) 4 T. R. 794.
(*c*) Antè, p. 286.
(*d*) 5 A. & E. 804.

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certain highway adjoining his land, in the course of constructing their railway; the return to which states, in substance, that the said Company have not touched, taken, or used any land belonging to the applicant, and therefore they contend that they are not liable to make any compensation. In the course of the argument various cases were cited; but at length it seemed to be agreed, and we think rightly, that this case must be decided on the provisions of the particular act applicable to it, as the decisions in the cases quoted were upon acts applicable to each; and the point in controversy between the parties is, whether the compensation clause in this act, the 6 & 7 Will. 4, c. cvi., intituled, "An act for making a Railway from London to Norwich and Yarmouth, by Romford, and Chelmsford, and Ipswich, and called the Eastern Counties Railway," be large enough to include the case of the applicant, none of whose land has been taken, or in any manner used by the said Company.

Before we advert to the provisions of this particular act, we think it not unfit to premise, that when such large powers are intrusted to a Company, to carry their works into execution without the consent of the owners and occupiers of the land, it is reasonable and just that any injury to property, which can be shewn to arise from the prosecution of those works, should be fairly compensated for to the party sustaining it. It is also observable, that no question arises on the 9th section, which empowers the Company to conduct their undertaking; those powers being not only to take land, but also "to alter, raise, or lower any roads or ways, in order the more conveniently to carry the same over or under the railway, making full satisfaction, in manner thereinafter mentioned, to all persons and corporations, for all damages by them sustained by reason of the execution of the act:" upon which clause it is important to remark, first, that in terms it comprehends cases of injury, independent of taking land; and next, that it is assumed,

that the satisfaction to be so made, which, if the parties cannot agree, must refer to the compensation clause, is to extend to all the cases of injury enumerated—one of which, as we have just observed, is an injury to any person, whether his land be taken or not. It is observable also, if the language of the section we have commented on had been in any degree doubtful, that the 36th clause plainly refers to cases wherein the jury may be summoned to inquire into loss or injury occasioned by the execution of the act, without any mention of the taking of land, provided a certain notice by the claimant has been previously given.

It now remains for us to consider—and upon this part of the case the chief reliance was placed on behalf of the Company—whether, although the alleged injury be within the 9th section, and it is there assumed, that such injury is within the compensation clause, the language is so restricted as necessarily to exclude it from that clause. The language of sect. 29 is, so far as it concerns the present question, to the following effect:—"and for settling all differences which may arise between the said Company and persons interested in any lands which shall or may be taken, used, damaged, or injuriously affected by the execution of the act;" and it enacts, among other things, that "if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept such purchase-money, satisfaction, recompense or other compensation as shall be offered by the said Company," a jury is to be summoned in the manner provided. "And such jury shall inquire of, and assess, and give a verdict for the sum to be paid for the purchase of such land, and also the sum to be paid by way of satisfaction, recompense, or compensation, either for damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands, whereof any such

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person as aforesaid shall be seised, possessed of, or interested in." Then follows: "which satisfaction, recompense, or compensation for such damage or loss shall be inquired into, and assessed separately from the value of the land so to be taken or used as aforesaid; and the sheriff, or other person, shall give judgment accordingly." Now, it must be admitted, with reference to this part of the section, that what the jury are specially directed to find, is applicable to cases of land, and of some ulterior damages thereupon; and the argument is, that because that precise injury is specially provided for, all others are virtually excluded. On the other hand, it is to be observed, that the words, "damaged or injuriously affected," may, and we think ought, when the intention is so previously expressed, to extend to injuries mentioned in the 9th sect., and to this injury among the rest. We also think the words, "if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or other compensation as aforesaid," do not necessarily refer to the preceding section (28th) alone, by supposing that section to apply to those persons only whose land has been taken; but that it may apply to cases mentioned in the 9th sect., and may include those. We also think, that where the intention to give compensation in such a case has been so clearly expressed, every fair intendment ought to be given to effectuate that intention. We have, therefore, not only in other parts of the act, but in the compensation clause itself "injuries" mentioned, to which the direction to the jury, as to the finding of the value of the land, and further damage to the person whose land has been actually taken, is inapplicable. But when we see it is expressly declared in the 9th sect., that an injury like the present is provided for in the compensation clause, and that the language, in the earlier part of the clause itself, is large enough to embrace it, we think that we ought not to defeat so plain and reasonable an intention of the legisla-

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ture, because the direction, as to the finding of the jury, is applicable also to a different case. In the present case, the inquiry of the jury would be confined to the amount of damages, if any had been sustained, and that alone.

Before we conclude, we may briefly advert to an argument which was much pressed upon us—that, if we make this rule absolute, any injury to land, at any distance from the line of railway, may become the object of compensation. If extreme cases should arise, we should know how to deal with them; but in the present instance, the alleged injury is to land adjoining a road, which has been lowered under the provisions of the said act, and is therefore land injuriously affected by an act expressly within the powers conferred on the Company. The return, therefore, being insufficient, a peremptory *mandamus* must be awarded.

Peremptory mandamus awarded.

COURT OF QUEEN'S BENCH.

Sittings after Michaelmas Term, 1841.

1841.
Nov. 26.

DOE *d.* MYATT *v.* THE ST. HELEN'S AND RUNCORN GAP RAILWAY COMPANY.

By a railway act, (11 Geo. 4, c. lxi, s. 75), a Company were empowered to borrow money on the credit of the undertaking, and to "assign and charge the property of the undertaking, and the rates and tolls, as a security for the money borrowed." The clause contained a form of mortgage, assigning to A. B., his executors, administrators and assigns, the said undertaking, and all and singular the rates, tolls, and other sums arising by virtue of the act, and all the estate, right, title, and interest, of, in, and to the same.

Held, in ejectment brought by a mortgagee, that the land of the Company was not included in the mortgage under the word "undertaking," and did not pass by such mortgage.

EJECTMENT to recover "the undertaking in certain acts of Parliament respectively mentioned, and all and singular the rates, tolls, and other sums arising by virtue of the same acts respectively, and all the estate, right, title, and interest of, in, and to the same."

The action was brought to recover possession of the railway and premises claimed by the lessor of the plaintiff, as mortgagee, for a sum of £300, lent by him to the Company, amongst many other mortgages, on the security of the undertaking, by virtue of the provisions of their act, (11 Geo. 4, c. lxi.) (*a*), by which, by deed-poll dated 10th

(*a*) Sect. 75 enacts, "That in case the money hereby authorized to be raised by subscription, as hereinbefore mentioned, shall be found insufficient for the purposes of this act, it shall be lawful for the said Company, by order of any general or special general meeting of the said Company, from time to time to borrow and take up at interest any further or additional sum, not exceeding in the whole the sum of thirty thousand pounds, on the credit of the said undertaking, as to them shall seem proper; and the said Company, or the directors of the said Company, after an order shall have been made for that purpose by any general meeting, are hereby authorized and empowered to assign and charge the property of the said undertaking, and the rates, tolls, and other sums arising or to arise by virtue of this act, or any other part thereof, the costs and charges of assigning the

December, 1834, the Company assigned "to him, his executors, administrators, and assigns, the said undertaking,

same to be paid out of such rates, tolls, or sums, as a security for any such further sum of money to be borrowed as aforesaid, with interest, to or for the benefit of the party, or to his or her trustees who shall advance the same; all which said mortgages, assignments, or charges shall be made under the common seal of the said Company, in the words or to the effect following, or with such variation therein as the circumstances of the loan may render necessary; (that is to say),

The Saint Helens and Runcorn Gap Railway Company.

Number .

By virtue of an act passed in the eleventh year of the reign of King George the Fourth, intituled [here set forth the title of this act], we, the Company of Proprietors of the Saint Helens and Runcorn Gap Railway, incorporated by and under the said act, in consideration of the sum of to us in hand paid by A. B., of , do assign unto the said A. B., his executors, administrators, and assigns, the said undertaking, and all and singular the rates, tolls, and other sums arising by virtue of the said act, and all the estate, right, title, and interest of, in, and to the same, to hold unto the said A. B., his executors, administrators, and assigns, until the said sum of , together with interest for the same after the rate of for every one hundred pounds for a year, shall be fully paid and satisfied. Given under our common seal this day of , in the year of our Lord .

And the respective parties to whom such mortgages or assignments shall be made shall, without preference, be entitled one with the other to their proportions of the said rates, tolls, and sums and premises, according to the respective sums in such mortgages or assignments mentioned to be advanced, without any preference by reason of priority in the date of any such order of meeting, or priority in date of any such mortgage or assignment, or on any other account whatsoever; and an entry or memorial of every such mortgage or assignment, containing the number and date thereof, and the names of the parties, with their proper additions, to whom the same shall have been made, and of the sums borrowed, together with the rate of interest to be paid thereon, shall, within fourteen days next after the date thereof, be entered in some book to be kept by the clerk of the said Company, which said book may be perused at all reasonable times by any of the proprietors or creditors of the said undertaking, or other persons interested therein, without fee or reward; and all persons to whom any such mortgage or assignment shall have been made as aforesaid, or who shall be entitled to the money due thereon, may from time to time transfer their respective rights and interests therein to any other person; and every

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and all and singular the rates, tolls, and other sums arising by virtue of the several acts, and all the estate, right, title, and interest of, in, and to the same, to hold to him, his executors, administrators, and assigns, until the said sum of £300 and interest should be paid." "Provided that upon payment, on or before the 1st January, 1837, the assignment shall determine and be void." Provided also, "that nothing herein contained shall extend to charge or encumber, or to hinder or prevent the said Company, or their successors, in or from selling all or any part of the lands, tenements, or hereditaments which have been or may be purchased by the said Company, and which by the said last-recited act (11 Geo. 4, c. lxi. s. 59) the said Company are authorized to sell."

The cause was tried before *Rolfe*, B., at the Liverpool Summer Assizes, 1840, when a verdict was found for the plaintiff, with leave to the defendant to move to enter a

transfer thereof shall and may be in the words or to the effect following, (that is to say),

I, A. B., of , in consideration of the sum of , paid by C. D., of , do hereby transfer a certain mortgage, number , made by the Company of Proprietors of the Saint Helens and Runcorn Gap Railway, to E. F., bearing date the day of , for securing the sum of and interest, and all my right, estate, and interest in and to the money thereby secured, and in and to the rates, tolls, and other sums, and property thereby assigned, to the said C. D., his executors, administrators, and assigns. Dated this day of , in the year of our Lord .

And every such transfer shall, within twenty-eight days after the date thereof, if executed in England, or otherwise within twenty-eight days next after the arrival thereof in England, if executed elsewhere, be produced to the clerk of the said Company, who shall cause an entry or memorial to be made thereof in the same manner as of the original mortgage or assignment, for which such clerk shall be paid such sum as the said Company shall appoint, not exceeding two shillings and sixpence; and after such entry made, every transfer shall retrospectively entitle such assignee, or his or her executors, administrators, and assigns, to the full benefit thereof and payment thereon; and it shall not be in the power of any person who shall have made such transfer to make void, release, or discharge the same, or any sum of money thereon due or thereby secured, or any part thereof."

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nonsuit, on the ground that the land of the Company had not passed by the mortgage; and *Cresswell*, in the following *Michaelmas* Term, having obtained a rule *nisi* accordingly,—

Pashley now shewed cause.—This action is maintainable, for the Company are entitled, by their act, to mortgage the land of the railway; and, by the terms of the deed, they have done so. Sect. 75 authorizes them to assign, besides the "rates and tolls," the "property" of the undertaking, which word must, therefore, mean something besides "rates and tolls," and is large enough to comprehend real estate. *Doe* d. *Wall* v. *Langlands* (a). A subsequent act of the Company (4 Will. 4, c. cxi.) uses the same words; and the 1 Vict. c. xxii. recites, that owners had been authorized to be secured by mortgages of the said railway and works. The legislature, therefore, clearly intended land to be included in "property."

That being assumed, the form of mortgage given by the act used in this case will be sufficient to pass land, otherwise the word "undertaking" will have no effect given to it; whereas this, being a deed-poll, should be construed most strongly against the grantor. *Muson* v. *Prichard* (b). Nor is there any difficulty as to entry giving the lessor of the plaintiff a preference over the other mortgagees, as he will be a mortgagee in the situation of bailiff or trustee for all the other creditors. *Doe* d. *Banks* v. *Booth* (c); *Doe* d. *Thompson* v. *Lelliard* (d); *Pontet* v. *The Basingstoke Canal Company* (e) is expressly in point. There a Canal Company were empowered by act of Parliament to raise money on the security of the canal and dues, the creditors to have no priority over each other. By the form of deed given in the act of Parliament authorizing the undertaking, the

(a) 14 East, 730.
(b) 12 East, 227; 2 Camp. 436.
(c) 2 B. & P. 219.
(d) 4 B. & Ad. 137.
(e) 3 B. N. C. 433.

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canal and dues were assigned to the lenders as a security for the principal money lent, the interest on which was to be paid half-yearly; and it was held, that an action of covenant for payment of interest did not lie against the Company on such deed; and *Tindal*, C. J., said, "The terms of this contract are satisfied by giving the lenders of money a security on the undertaking, without allowing them to sue the corporation. Their remedy would be by entering on the property of the Company." [*Coleridge*, J.—There is no such power given to an assignee to take tolls as sect. 115 gives to the Company. If the Company are put out of possession, how are the rates and tolls to be levied?] The assignees would be implied to have the same power. [Lord *Denman*, C. J.—There is a power of sale reserved to the Company by the deed, of all or any of the lands, tenements, and hereditaments, which they have or may purchase.] That is confined to such lands as are not wanted by the Company,—a power to sell which is given by sect. 59.

Cresswell and *Crompton*, contrà, were stopped by the Court.

Lord DENMAN, C. J.—I cannot find any power given by the act of Parliament to the Company to demise their land. The form of the mortgage must decide the right of the parties; and those who advance money must see they have good security. [His Lordship read the deed]. The word "property" may apply to undertaking, but what the meaning is of the words "said undertaking" I do not understand: I should have decided this case with more satisfaction if I could see to what they applied. The cases referred to under turnpike acts, as to the mortgage of toll-houses and toll-gates, as well as tolls, do not apply; and, in some of the cases, there was a clear demise of them. The observations of *Tindal*, C. J., in *Pontet* v. *The Basingstoke Canal Company*(*a*), shew that at that moment he thought

(*a*) 3 B. N. C. 433.

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the deed did convey a right to enter, and is so far favourable to the plaintiff; but the alternative was not necessary for him to decide; and perhaps if it had been necessary to have more fully considered the statute, it would have been thought doubtful whether it gave such a power. In my opinion, there is nothing in those words to justify the construction that they contain a demise of the land, or of any portion of the real estate of the defendants. Such a demise would not only be exceedingly improbable, but very inconvenient to the public, as it would perchance prevent the carrying on of the very "undertaking," by means of which the defendants were to be enabled to satisfy the demands of their creditors, and to promote the convenience of the public. The rule for entering a nonsuit must, therefore, be absolute.

WILLIAMS, J.—The inference raised from the 59th sect., empowering this Company to sell land not wanted by them, does not seem to me to vary this case. The question is, whether, in the fair meaning of the 75th sect., the word "undertaking" can be considered as embracing land. I think not; and no rule of law goes the length of saying, that you are to add words to aid such a construction, or give to those employed a meaning which they do not bear.

COLERIDGE, J.—This is purely a question of construction. The words in the form of mortgage assigning "the said undertaking, and all and singular the rates, tolls, &c.," follow the words giving power to the Company to raise money, and are consistent with that power. The word "undertaking" is certainly ambiguous; it may mean, as contended, the entire speculation; if so, it enables the mortgagee to put an end to the whole powers: for if he takes possession, I do not see that the act gives him any power to take tolls, and the Company would not be enabled to

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receive them. That certainly seems a monstrous power to be given. The act must have contemplated the borrowing of money by mortgage, consistently with carrying on the undertaking. Sect. 77 provides, that no person, by being a mortgagee, shall be entitled to become a proprietor, which seems to favour the supposition that his security is not to be of such a nature as to entitle him to take possession.

WIGHTMAN, J.—I am of the same opinion. It seems to me that the construction of the mortgage clause contended for is quite inconsistent with the objects of the legislature.

Rule absolute.

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Feb. 15th.

The defendants, not being possessed of compulsory powers for taking land for the purposes of a railway, and it being necessary for them, in order to complete their line, to cross the plaintiffs' railway, gave notice of their intention of crossing the same, but were restrained by injunction from so doing until the question of right could be decided at law. They had entered into a contract with an owner of land on one side of the plaintiff's railway, by which a way-leave was to be granted if the line were completed within a certain time: but this injunction would render it impossible for them to complete their contract:—*Held*, that the injunction should be dissolved so far as to enable the defendants to complete their contract.

Semble, where the construction of an act of Parliament is doubtful, the Court will send the question to a Court of Law; in the meantime granting, continuing, or dissolving the injunction (as the case may be) in favour of the party who will sustain the greater injury.

And that the Court will not consider mere inconvenience in the light of injury.

Semble also, that Companies have a right to carry on their railway according to the plan laid down in their act, although a junction contemplated in procuring such act, may be frustrated by the abandonment of the line with which it was the original intention of the Company to unite.

BILL filed the 2nd of July, 1841, stated the incorporation of the plaintiffs by an act of Parliament passed on the 23rd of May, 1828, intituled, "An Act for making and maintaining a Railway from the River Tees, near Haverton Hill, in the parish of Billingham, to a place called Sim Pasture Farm, in the parish of Heighington, all in the county of Durham, with certain branches therefrom" (*a*).

That the powers thereby conferred were enlarged by a subsequent Act, passed on the 1st of June, 1829, whereby the said Company were empowered to make and maintain

(*a*) It was by this Act, among other things, enacted: "That nothing herein contained shall extend to prevent the owners and occupiers of the respective lands or grounds adjoining the railways or tram-roads hereby authorized to be made, from constructing and laying down, either upon their own lands or grounds or upon the lands or grounds of other persons with the consent of such other persons, any collateral branch or branches from their respective lands or grounds to communicate with the said railways or tram-roads, nor from making, at their own expense, such openings in the ledges or flanches of the said railways or tram-roads as may be necessary or proper for effecting such communication, and that the Company of proprietors hereby incorporated shall not be entitled to receive any tonnage for the passing of any goods or other things along such branch or branches."

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an additional branch railway, to be called the Sherburn Branch Railway, and that the said powers were further extended by subsequent Acts of Parliament passed respectively on the 2nd of April, 1832, in the year 1833, and 12th of July, 1837.

That the defendants were incorporated by act of Parliament 1st Vict. c. xcv., intituled, "An Act for making and maintaining a Railway to connect the Great North of England, Clarence, and Hartlepool Railways in the county of Durham."

That by the 3rd sect. of the said Act, the defendants were empowered to construct the railway, with all proper works and conveniences connected therewith, in the line or course, and upon, across, under, and over the lands delineated on the plan therein referred to; and that, by the 4th sect. of the said act, it was enacted, that nothing therein contained should authorize or empower the said defendants to enter into or upon, or take, use, damage, or prejudice the lands, estate, property, and effects of any corporation or person whomsoever, without the consent in writing of the owner and occupier thereof, or other property by the same Act or otherwise entitled to give such consent, first had and obtained; and by the 14th sect. it was enacted, that nothing therein contained should extend to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in the said Clarence Railway Company, but saving and reserving to the said Clarence Railway Company all such rights, privileges, powers, and authorities in the same manner to all intents and purposes as if the act then in recital had not been passed: That the act contained various provisions restricting the defendants from deviating from the line in the plan: That the Sherburn Branch Railway was completed by the plaintiffs, and that there was great traffic thereon.

That in July, 1838, the defendants evinced a clear and undoubted design of deviating from the line laid down in

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their plan, and thereupon plaintiffs served them with a notice "not to enter into, or upon, or take, use, cross, or communicate with any part of their railway, in any other manner than is authorized by Act of Parliament, and without obtaining their previous consent thereto," and they also served the defendant with similar notices on the 16th of August, 1838, and 25th March, 1840: That the defendants served notices on the plaintiffs in April, May, and June, 1841, to the effect that they intended to cross the Junction Railway in Thrislington Valley; and in the bill was contained an allegation that defendants intended to deviate from the line delineated in their plan, and it prayed that the said defendants, their agents, servants, and workmen, might be restrained by injunction from constructing their railway across plaintiff's Sherburn Branch Railway, where their works approached the same, in the said township of Thrislington, for the purpose of deviating from the line prescribed in the said act of Parliament whereby they were incorporated, and from making any openings in the ledges or flanches of the rails on plaintiffs' said branch, and from cutting down or destroying the hedge or fence which bounded such branch, and from taking any other proceedings for the purpose of constructing their railway across the same, or for general relief.

On the 14th of August, 1841, an application was made to his Honor the Vice-Chancellor of England for an injunction according to the prayer of the bill, and after argument on both sides, in which Mr. *K. Bruce* and Mr. *Giffard* were for the plaintiffs, and Mr. *Richards* and Mr. *Geldart* for the defendants,

The VICE-CHANCELLOR.—I think that this injunction ought to be granted, because the real point is, whether the rights of the parties ought to be varied before the legal question is ascertained, and that if I were not to interfere,

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the Junction Railway Company would deal with the property of the Clarence Railway Company before it was ascertained on the Act of Parliament that they had a clear right so to do. On looking at the act of Parliament, this appears to me only what may be called a permissive Act, and that it never was intended that there should be any thing compulsory against the Clarence Railway Company, because by the 14th sect. it is expressly enacted, "that nothing in this act contained shall extend to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in the said Clarence Railway Company, but &c. (*a*);" and although not good English, I am of opinion that it has a very clear meaning; and that this clause must be considered as overruling all the clauses in the Act of Parliament: the injunction must therefore be granted; the plaintiffs undertaking to bring an action of trespass against the defendants; the defendants undertaking to defend, and to admit that the planches of the plaintiffs' branch railway have been taken up.

The defendants gave notice of a motion to dissolve the injunction, thereby undertaking at their own expense, in case, after the trial of the issue, the Court should be ultimately of opinion that they were not authorized by their act of incorporation, or otherwise, to form a railway in the manner in the bill mentioned, or without the plaintiffs' consent to remove any planches &c. for the purpose of crossing the same, to reinstate the same, and to make to the said plaintiffs compensation as the Court should direct.

The motion was supported by affidavits. By those filed on the part of the defendants, it appeared, that after the expiration of five years, the powers of the Junction

(*a*) Ante, p. 764.

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Railway Company were to cease, except as to so much of the railway and works as should be declared to be completed in manner therein mentioned; and that, by an agreement dated the 12th of April, 1837, between the directors of the said Company and the Rev. R. H. Williamson, a way-leave was granted to the said Company for ninety-nine years, at a rent to commence as soon as the Company should convey and lead coals along the said railway; and it was stipulated that in case the said railway should not be made and completed within five years from the date of the said agreement, the powers and liberties thereby agreed should cease and determine; and that the time limited by said agreement would expire on the 12th of April then next, and that Mr. Williamson had refused to extend the time, and that deponent believed that Mr. Williamson would not consent to the same being made over his land upon the terms, or much higher terms, than those contained in the agreement; that defendants did not intend to cross the Sherburn Branch Railway at any other point or in any other course than that prescribed by their act of incorporation; and that great and irreparable injury would be occasioned, if defendants were prevented from completing their railway over the said lands, and that they would be able to complete their railway if allowed to cross the Sherburn Branch.

That the trial at law directed to be heard in the Queen's Bench could not be heard before *Trinity* or *Michaelmas* Term, but that if the same had been set down for argument in the Court of Exchequer (as desired by the defendants), the same could be heard at the sittings after term appointed to commence on the 9th February then instant.

By the affidavits of the plaintiffs in answer, it appeared that the Great North of England Railway pointed out in the plan (with which the Clarence Railway was to communicate), was not then constructed, nor any works com-

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menced within sixteen or seventeen miles to the north and south part of the junction, and that deponent believed that such parts of the said line were not intended to be formed; and that, by petition presented by the Great North of England Railway Company on the 4th February then instant to the House of Commons, they had applied for powers of sale of the part which the defendants had specified in their plan as their point of junction; and that the defendants were allowed to apply to Parliament for compulsory powers for purchase of lands.

Mr. *Richards*, Mr. *Geldart*, and Mr. *Tomlinson*, in support of the motion.—The title of the Act of Parliament, "An act for making and maintaining a Railway, to connect the Great North of England, Clarence, and Hartlepool Railways, in the County of Durham," shews that a junction was intended by the legislature, and that, it being impossible to join the Clarence and Great Northern, without crossing the Sherburn branch, the purpose of the Act would be frustrated by continuing the injunction. At the time of granting the injunction, the agreement, under which the defendants' way-leave would cease on the 12th of April then next, was not before the Court, as it was supposed that the legal right would have been decided in time to have enabled them to avail themselves of that agreement. The 15th, 16th, 17th, and 42nd sections of the defendants' act of incorporation, shew the intention of the legislature, and also more particularly the 43rd section, whereby it was enacted, "that in every case in which the said railway by this act authorized to be constructed shall cross any other railway, whether public or private, the communication between their railway by this act, &c., and such other railway, and all openings in the ledges or flanches of the rails of such other railway, if the same shall be crossed at a level, or if, &c., shall, if the said Company, and the parties to whom such other rail-

way shall belong, do not agree about the same, be made in such manner as shall be directed by two engineers, or, &c. Provided always, that in case the party to whom any railway so to be crossed shall belong, shall refuse, or, for the space of twenty-one days next after notice, signed by the clerk for the time being of the said Company, requiring him so to do, shall neglect to appoint such engineer, or other person on his behalf, the engineer for the time being of the said company shall have full power to make such communications with and such openings in the ledges, &c., as he shall think proper. Provided also that the said Company shall defray expenses and make satisfaction for any temporary, or permanent, or recurring injury, &c. And the said Company shall have full power at all times to cross every such railway, by means of such communication, with their engines and carriages, without being liable to the payment for any toll or rate for so crossing." It is a principle laid down by his Honor, in *Caswell* v. *Bell* (*a*), that the whole language of the Act was to be taken together, and that no restrictive words in one section should be permitted to override the fair construction and interpretation to be put on subsequent powers, and therefore the whole equity of the plaintiffs' bill rests on the ground of deviation, which is completely denied by the affidavits of the defendants. It is quite inconsistent with the intention of the legislature to let the defendants incur expenses and make railways up to the Clarence Railway, and then to leave them at the mercy of the Clarence Railway Company. The plaintiffs were not looked upon by the legislature in the character of beneficial owners in a private capacity, but were to be considered as the trustees of a high-road. No injury can accrue to plaintiffs by dissolving the injunction, as the Court will impose such terms as will completely reinstate

(*a*) Post, p. 782.

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and compensate them. The legal right cannot be tried until the Act of Parliament has ceased, and the decision of the question, if in favour of the defendants, can give them no satisfaction, as the damage to them will be irreparable.

Mr. *Stuart* and Mr. *Giffard*, contrà.—The plaintiffs rely on the protection given to them by the 4th sect. of the defendants' act (*a*). It is not a question of deviation, but whether the defendants have a right to pass at all without the permission of plaintiffs. The Act is merely a permissive Act; and does not contain any compulsory clauses.

Mr. *Richards* replied.

THE VICE-CHANCELLOR.—I shall do in this case what I have done in all other cases, and which I conceive is the only course which can be taken; viz. that, where the parties apply to me for an injunction to restrain something which it is alleged under an Act of Parliament the parties who intend to do it are not justified in doing, I must look at the Act of Parliament, and put the best construction I can; and for the purpose of determining whether I can grant the injunction or not, I must, in the first instance, act according to that which appears to me to be the law. So, if I find, that, on the apparent construction of the act, the thing complained of is illegal, I must interpose by injunction to prevent it, at the same time allowing the matter to be put in a course of trial so as finally and certainly to know what the law is; and so, *vice versâ*, if it appears that what they are doing is legal, I shall then suspend the granting the injunction, but equally adopt the means of having the opinion of a Court of law on the point. When this matter was before me in the month of August, it was, as I recollect, a good deal discussed; and my attention was

(*a*) Ante, p. 754.

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certainly called to the circumstance, that this act of Parliament was rather a permissive act than an act of a compulsory nature, and I make the observation with reference to what Mr. *Tomlinson* has said, namely, that it would be an answer to any *mandamus* which might be asked for to say, the Court of Queen's Bench ought not to issue a *mandamus* to compel us to make the line of our road, because such compulsion as there may be upon us to form the road is made by the act which creates the compulsion, dependent, however, on the contingency of our obtaining permission from a vast variety of persons. Certainly this act of Parliament appears to me on the face of it to differ from the Act of Parliament in the case of *Gaswell v. Bell* (*a*), because there there was a general clause which restricted and saved in the most absolute manner the rights of the Black Sluice Commissioners; but I found also that there was a positive enactment that something should be done by the Bourn Fen Commissioners, which itself could not be done without an interference with the general rights of the Black Sluice Commissioners as they appeared by the Black Sluice Act and the Bourn Fen Act, and therefore I was bound to put the best construction I could, and I held that, for the purpose for which I was then applied to, that the Bourn Fen Commissioners were justified in doing the thing which they had done, and for that reason therefore I refused to grant the injunction, but put the matter in a way of trial. Now it is very remarkable that the affidavit of Mr. Bowell, before me in August, contained in it this passage,—"That, previously to obtaining the said Act, the said Hartlepool Junction Railway Company had entered into agreements, or made arrangements, for the purchase of the greater part of the lands or way-leaves over the greater part of the lands necessary for the formation of the railway, authorized by the said act to be made, and on account of the great benefit which the owners of lands in the

(*a*) Post, p. 782.

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neighbourhood of the said intended railway would derive from the formation thereof, it was considered that there would be no difficulty in obtaining, by means of private agreements or arrangements, the whole of the lands or way-leaves over the lands necessary for the formation of the said railway, and on that account it was not considered necessary to have any compulsory clauses in the said Act to enable the said Company to take lands." And on this day going through the Act, I see it is constructed in such a manner, that, for the purpose of enlarging the power of dealing with those who might please to deal with the New Railway Company, powers are given to enable tenants for life only to convey the fee-simple, and so on; but the Act, from the beginning to the end, is constructed with a view to enable the Railway Company to deal largely in the way of treaty; but no absolute power is given to them to take an inch of ground, though the having it might determine the question, whether the railway should ever be made or not. No such power is given, I therefore think that, *primâ facie*, what is proposed to be done by the defendants is against the act of Parliament. The 13th (*a*) and 14th (*b*) sections, though they have a clear meaning, are irregular in point of expression. With respect to the 43rd section (*c*), it plainly appears to me that the meaning of it is, that in a case where there has been a general permission given to cross the railway, the question arises how shall the crossing be effected; and it is for the purpose of preventing endless objections and disputes about the manner of doing this that the act of Parliament appoints the machinery by

(*a*) The 13th sect. enacts that nothing in the said Act contained shall extend to prejudice, diminish, alter, or take away any of the rights, privileges, powers, or authorities vested in the said Great North of England Railway Company, but saves and reserves to the said Great North of England Railway Company all such rights, privileges, powers, and authorities, in the same manner to all intents and purposes as if the said act had not been passed.

(*b*) Antè, p. 734.

(*c*) Antè, p. 739.

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which the question, how it shall be done, is to be decided. If this be the true construction of the clause, then there is no difficulty arising on the language; and that it is so, certainly appears from the particular expressions, "Provided always, that in case the party to whom any railway so to be crossed shall belong, shall refuse, or, for the space of twenty-one days next after notice of &c. requiring him so to do, shall neglect"—to do what? not to give leave, which is assumed, but—"to appoint some engineer or other person on their behalf, then the engineer of the Company shall have full power, &c." It being in every case supposed that previous leave has been given to make the crossing. And this construction makes the whole of the Act consistent.

My opinion is, that the Company, the defendants, have no right, of their own authority, to cross the railway in question without the consent of the plaintiffs, who are the owners of it; I will however let the matter stand as it is,—let it be tried at law. Mr. *Richards* has relied on this, that the plaintiffs knew from the beginning that the defendants must cross their railway. But in the affidavit of Mr. Jackson it appears that in the month of June, 1838, there had been an anticipation that the defendants meant to deviate; and his letter says, "The Clarence Railway Company, having heard that you intend to carry the line &c., instruct me to give you notice they will not permit you thus, nor in any other manner, to interfere with their property and rights without their express consent in writing." And all the subsequent correspondence which took place, until the filing of the bill, seems to me to insist that the defendants shall not cross the plaintiffs' line without the plaintiffs' permission; and I think, therefore, that nothing turns on that. Then it is said that irreparable injury will be done, unless I so far dissolve the injunction as to allow the defendants to do what they project, putting them on an undertaking,

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in case it shall appear that the law is against them, to reinstate the property which they may have interfered with. With respect to that, it appears to me that it is a mere speculation, for on the face of all these affidavits, taken together, it rather appears that the Great North of England Railway Company are desirous to get rid of their parliamentary powers to make their railway, and the obligation of so doing: and I mention this more particularly because I see that the power which is given by the 3rd sect. (*a*) of the defendants' Act is a power not to join the North of England Railway generally, but to join a certain intended railway, called &c., in one or more of certain fields situate in the parish of Merrington; so that there is no power given to them to do that which ultimately may turn out to be the only beneficial thing, viz. to join the intended Great North of England Railway in some other place; and it does appear to me to be reasonably plain, that if the Great North of England Railway should not be so made as to pass through the fields in the said parish, that the power given by this present Act is no power at all. It would be a power not applicable to the subject-matter. And it also appears that the defendants may apply to Parliament for some other powers and rights, and therefore the notion that irreparable damage will be done by the defendants, unless I interfere, rather seems to me to be excluded by those parliamentary speculations about future powers, which the railway-makers concerned seem to be at present entertaining; and I am of opinion that at present, I have no good ground for interfering with the order which I made in August. — The plaintiffs were allowed their costs.

The motion to dissolve the injunction was afterwards (on the 7th of March) renewed by appeal before the Lord Chancellor.

(*a*) Antè, p. 734.

Mr. *G. Richards*, and Mr. *Geldart*, in support of the motion.

Mr. *Stuart*, Mr. *G. Turner*, and Mr. *Giffard*, contrà.

THE LORD CHANCELLOR.—This question about the Clarence Railway Company is stated to be one of great interest and importance to the parties. Undoubtedly, in one view of the case, it is so, because, if the Hartlepool Railway is allowed to be carried across the line of the Clarence Railway, and to be continued on the western side of that railway, a direct line of communication will be formed between the western side of the Clarence Railway and Hartlepool, and of course the proprietors of that railway will be formidable rivals to the Clarence Railway Company, inasmuch as the Clarence Railway to Hartlepool goes in a very circuitous direction. It is material therefore and important to the proprietors of the Clarence Railway, that the proprietors of the Hartlepool Railway should not cross their line. On the other hand, it is of great importance to the proprietors of the Hartlepool Railway that they should cross the line, because a great part of the object they had in view in forming their railway will be lost if they are not allowed this privilege. In this view of the subject therefore, the question is of great importance to the proprietors both of the one railway and the other; but perhaps the question on the present occasion may be confined within much narrower limits. The question turns on the construction of the Act of Parliament. I have attended very much to the arguments on both sides with respect to it, I have read the Act of Parliament with attention, and I must say, that whether you adopt the one construction or the other construction, there are very great difficulties to contend with. The utmost I can say, is, that the construction of the Act of Parliament is extremely doubtful, and as I am not called on to decide it, it is not necessary

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for me to say on which side in my judgment the balance rests. It is a proper question for a Court of law, and must be subjected to the decision of a Court of law; and the only question that I have to decide here is, what shall be done in the mean time for the purpose, as far as possible, of reconciling the interests of the two parties. It was suggested by Mr. *Richards* that there had been considerable and unnecessary delay in taking the opinion of a Court of law: I have read the affidavits on both sides, and am very far from agreeing in opinion with Mr. *Richards* on that point. It was open to the proprietors of the Clarence Railway to select their Court, they were not limited in this respect by the order, they preferred the Court of Queen's Bench to the Court of Exchequer, or any other Court; and adverting to the form of the proceedings and the pleadings, namely, that in the first instance there are several special pleas, and upon those pleas a question is raised by demurrer, and that there is a new assignment, and an issue taken on that new assignment, I cannot come to the conclusion, after reading the affidavits with attention, that there has been any unnecessary delay. The case was prepared and presented to the Court of law with as much expedition as it was reasonable to expect. Now then, the question is, as I have before said, what is to be done in the mean time with reference to the interests of the two parties? It is stated on the part of the proprietors of the Clarence Railway, that if the Hartlepool Railway is carried across, or, if they are allowed to go across the Clarence Railway for the purpose of carrying on their works, irremediable injury will be done to them. On the other hand, it is said on the part of the Hartlepool Railway Company, that, if they are not allowed to go across the Clarence Railway, they will suffer irremediable injury. It is necessary to consider the state of facts, and the arguments that have been urged on both sides, with reference to this position of things. Mr. *Turner*, in the course of

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his argument, stated that the irremediable injury will be of this description: that if the proprietors of the Hartlepool Railway are allowed to go across the Clarence Railway, the public will have a right to use that railway as soon as they use it themselves, and they will carry their coals and produce to Hartlepool to the great injury of the rival railway, the Clarence Railway; but it does not appear to me that that consequence will at all follow. The proprietors of the Hartlepool Railway may have a right, for the purpose of completing their railway, to go across the Clarence Railway; but the public, until their railway is completed, or is in a very forward state, will have no right to make use of it; and there is no danger therefore of the public making use of that railway previously to the decision of the question of law. And the moment the decision of the question of law takes place, if that decision is in favour of the Clarence Railway Company, the consequences will follow, that the proprietors of the Hartlepool Railway from that time will not have a right to cross the Clarence Railway, nor will the public have a right to cross it; and therefore as to the question of irremediable injury arising from that source, it does not appear to me to exist. Then what is the other injury that is likely to result to the proprietors of the Clarence Railway? It is merely this, as it appears to me, that it will be inconvenient to them to a certain degree that the carts and waggons of the Hartlepool Railway Company should, for the purpose of forming their railway on the western side, cross the Clarence Railway, and some little difficulty and obstruction no doubt may arise from laying down the rails that are necessary for that purpose; but, on looking at the affidavits, I find that, in the course of a single night, or rather in the course of three or four hours, those rails may be laid down, and that no serious obstruction will take place to the use of the Clarence Railway. Undoubtedly, waggons passing from time to time, for the purpose of

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carrying materials to and from the Hartlepool Railway, will, to a certain extent, be an inconvenience to the proprietors of the Clarence Railway; but that is not at all in the nature of an irreparable injury; compensation may be made for that; and it does not appear to me that, on the part of the Clarence Railway Company, any case of irremediable or irreparable injury has been established. The utmost that can be said is, that, to a certain degree, inconvenience will arise to them; but, for such inconvenience, they may receive pecuniary compensation. Then the question is, what is the nature of the injury that will be sustained on the other side, provided they are not allowed to carry on their works? It appears that a contract has been entered into with Mr. Williamson, and that that contract will be at an end unless it is completed by the 12th of April. Now, if they are not allowed to carry on their works, and if the railway is not completed according to the terms of the contract, Mr. Williamson may, if he thinks proper, prevent the railway from being afterwards formed. Now, supposing that the Court of law should decide that they have a right to pass over the Clarence Railway, in what situation will these parties be placed? The decision of the Court of law may be in their favour, and yet they may be unable afterwards to take a single step for the purpose of completing their works. The injury to them clearly therefore is irremediable. But then it is said, how does it appear that they will be able to complete their works within the period limited by the contract with Mr. Williamson? If I were asked my opinion on that subject, I should say that they could not complete their works within that period, and that there would be an end to the contract. That is my opinion; but that is an opinion of an uninformed person with respect to engineering, and is merely a speculative opinion. I am obliged to look at the affidavits, and I find the affidavit of the engineer stating in distinct and precise terms that he is quite sure

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that the works may be completed within the time limited by that contract. I do not think that I am entitled, on a matter of fact of this description—on mere speculation of my own—to disregard that statement, and to set up my judgment in opposition to that of the engineer, established as it is by affidavit in the cause. It has been stated that there was negligence in endeavouring to obtain the consent of Mr. Williamson to an extension of the contract. An application was made to extend the time on certain terms; I cannot take upon myself to say that there was any thing unreasonable in the terms in which that application was made; but it is deserving of remark, that when that application was made to Mr. Williamson it met with a positive and peremptory refusal; and there was no suggestion on the part of Mr. Williamson that he would be open to any other proposal: and it is said also by the parties making that affidavit respecting the circumstance at the time, that they believed that he would not consent to any extension of the time. At all events, it is possible he may not assent; we have no means of knowing, with absolute certainty, whether he will or will not do so; and I do not think the bare possibility that he will assent ought to be taken into consideration in this case; because, if he does not assent, it will be impossible for the parties to complete their railway. It was said, in the course of the argument, that the parties had no right to proceed with this railway with reference to the Act of Parliament, because it was a power given them to carry on the Hartlepool Railway for the purpose of forming a junction with the North of England Railway, and that the North of England Railway being abandoned, therefore the object of the Act of Parliament is at an end. But the Act of Parliament gives them a right to carry on the railway, first of all, for the purpose of uniting it with the Clarence Railway, that is, with one branch, the Byer's Green Branch of the Clarence Railway; and next, for the pur-

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pose of forming a junction, at a particular point marked in the plan, with an intended railway called the North of England Railway. I am by no means satisfied with respect to that part of the North of England Railway that the intention of proceeding with it is abandoned; I do not think that that case is satisfactorily made out; but even supposing it were abandoned, they have a right to carry on their railway according to their plan—the plan which is annexed to or referred to in the Act of Parliament—up to a certain point. The advantages arising from that railway are two-fold; first of all, to carry the coal belonging to the proprietors on each side of that railway to Hartlepool; and beyond that they would also have the advantage from the communication with the North of England Railway, if completed, to carry coal brought by that railway to the point of junction. But whether that other railway be completed or not, a part of the object exists; namely, to carry the coal of the proprietors on each side of the line, on the railway which they are authorized to make up to a certain point. Therefore, if there is any objection in this case, certainly I shall not consider it, with reference to the present question, any serious objection, that up to the present time the North of England Railway has not been completed, particularly as I am by no means satisfied that there is any intention of ultimately abandoning it. Some observations were made on the construction of the agreement with Mr. Williamson, and I expressed rather a strong opinion on that point; but I do not think that I am called upon to decide a doubtful question as to the construction of the agreement with Mr. Williamson, and particularly in the absence of Mr. Williamson. The case that I put on the part of the Hartlepool Railway is this, that if it should ultimately be decided that they have a right to cross the Clarence Railway, and they have not now the power of doing it, for the purpose of completing their works, that decision will be wholly useless to them,

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because Mr. Williamson may interfere and say, I shall not extend the term of my contract with you, and I will not allow you further to prosecute your works on the western side of the Clarence Railway. It is for these reasons, therefore, that, taking the balance of inconvenience into account, I think the balance of inconvenience is decidedly on the part of the Hartlepool Railway Company, and therefore that, to a certain extent, the injunction ought to be dissolved. But I think that it ought to be dissolved only to this extent, namely, to allow them to use the railway for the purpose of constructing their works only, if they are able to do it, across that portion of the land over which they have the right of carrying their railway by virtue of their agreement with Mr. Williamson. They are not to use it for the purposes of traffic, but merely for the purpose of completing their works, and giving effect to that part of the contract with Mr. Williamson by which coals are to be carried as well as the works completed within a certain time. They shall only therefore carry coals sufficient for the purpose of giving effect to that contract.

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The defendants were authorized by an Act (4 & 5 Vict. c. cxiii.) to make certain works for the better drainage of lands, with this proviso: (s. 62) —"That nothing should extend to affect any works already made, or then existing, or provided for the drainage of the land then vested in the plaintiffs." Several clauses of the Act being inconsistent with this proviso, the defendants proceeded to widen one of the drains vested in the plaintiffs:—*Held*, on appeal, that the plaintiffs were entitled to an injunction, on their undertaking to bring an action forthwith to try the right at law.

BILL filed 6th January, 1842, stated that an Act of Parliament was passed in the 5th of Geo. 3, c. lxxxvi. intituled, "An Act for draining and improving certain low, marsh, and fen lands lying between Boston-haven and Bourn, in &c. the county of Lincoln," whereby, after reciting that certain marsh, low, and fen lands, lying &c., were frequently overflowed with water through the insufficiency and decay of their outfalls to sea, whereby they were become of far less use and value to the owners thereof, though they were very capable of being drained and improved, it was enacted, that, for the more effectual execution of the said Act, all the lands and grounds whatsoever within the boundaries thereinbefore described, and all works whatsoever already made, or to be made or erected by virtue of the said Act for the purpose of drainage or improvement thereof, and also all sewers, drains, watercourses, and all other matters and things whatsoever within the said boundaries, should from and after the first meeting of the commissioners thereinafter appointed, be subject only to the control, direction, survey, order, and jurisdiction of the commissioners thereinafter appointed and directed to be chosen, and not to the control, direction, survey, order, or jurisdiction of any commissioners of sewers, or any law or statute relating to sewers; and then follow the several enactments for appointing commissioners, and of taxing the lands for defraying the expenses of draining; and also enactments whereby powers were given to the said commissioners to make, cleanse, and keep in repair cuts, &c., and erect engines, and remove obstructions, and whereby the directions of all the private works of drainage, except in Holland Fen, were given to the said commissioners.

And by the said bill it was also stated, that under or by

virtue of the said Act of Parliament, commissioners called the Black Sluice Commissioners were duly elected, and had ever since from time to time been duly elected for the purpose of putting the said Act into execution, and that the plaintiffs were thirty-four of such Black Sluice Commissioners.

That there were 64,000 acres of land and upwards which paid taxes to the said commissioners.

That the main drain for effecting the drainage of the said level was called the South Forty-foot or New River, and which was about twenty miles in length, commencing in the parish of Bourn, and terminating in the sea at Boston, where it emptied itself into the sea through a sluice called the Black Sluice.

That during occasional high tides, or when there was a more than usual quantity of land-water, the said fens were liable to be flooded. That in addition to the said South Forty-foot drain or river, there was another drain running parallel, and on the east side thereof, called the Hammond Beck, and which discharged itself into the said river at a short distance from the said Black Sluice; and that there were many drains on the east, and more particularly on the west side of the said river for draining the said fens; and that the commissioners from time to time elected under the said act, had duly put the said Act and the Acts thereinafter mentioned into execution.

That an Act was passed (10th Geo. 3), intituled, "An Act for amending and rendering more effectual the said Act of the 5th year of Geo. 3;" whereby it was enacted, that the right and property of the several locks &c. and other works to be made use of for the purpose of drainage and navigation respectively, and of the materials of which the same should consist, should be vested in the said commissioners; and they, or any five or more of them, were thereby empowered to bring actions &c. in the name of the treasurer or clerk.

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That another Act of Parliament was made and passed (6th Geo. 3), intituled "An Act for allotting, dividing, inclosing, and draining several open and common fields, meadows, waste and fen grounds within the manor and parish of Bourn;" whereby, after reciting that there were within the said parish certain large common fens, called the North Fen and Dyke Fen, containing together about 4,440 acres, which were frequently overflowed with water, and of little use to those who had right of common thereon it was enacted, that the commissioners therein named should set out and allot 340 acres, part of the said fens; part of which should be applied for roads, &c., and the remainder should vest in the commissioners therein named until their award, and after the execution thereof, in the commissioners appointed under the said Act of 5th Geo. 3. And it was further enacted, that all the banks &c. should vest in the said commissioners until their said award, and thenceforth in the commissioners for putting in execution the said Act of 5th Geo. 3.

That the said commissioners under the said act of 6 Geo. 3, allotted 340 acres, and made a drain in the said parish of Bourn for drainage of Bourn North Fen and Dyke Fen.

That they made their award; and thereupon the said drain, and remainder of the said 340 acres, (which remainder contained 219 acres or thereabout), became and were then vested in the said Black Sluice Commissioners.

That the said Black Sluice Commissioners had from time to time let the said residue of the said 340 acres, and the income thereof, since the year 1810, had been sufficient to exonerate the inhabitants and owners of the North Bank and Fen from the payment of a tax of 20*s*. and 10*s*. directed to be raised under the said Act of the 10th Geo. 3; and that since the year 1810, the income of the said residue of the said 340 acres had been paid for the benefit of the said parish of Bourne.

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That the said remainder of the 340 acres was let to Isaac Teesdale for seven years from March, 1838, at the yearly rent of £550.

That by an Act (4 & 5 Vict. c. cxiii.), intituled, "An Act for the better drainage of lands in Bourn North Fen and Dyke Fen, in the manor and parish of Bourn, in the county of Lincoln" reciting the said Act of 6th Geo. 3; and reciting, that divers engines and works of drainage were made under the powers and provisions of the said Act, but such engines afterwards became dilapidated and decayed, and were then entirely removed; and a district of land within the said manor and parish of Bourn, called Bourn North Fen and Dyke Fen, was liable to be greatly inundated and oppressed by water, and the means of drainage were very imperfect and insufficient; and reciting, that the lands in the said fens, called Bourn North Fen and Dyke Fen, might be more effectually drained, if powers were granted for erecting and building in the said fens, or one of them, one or more engine or engines to be worked by the power of steam for the purpose of facilitating the discharge of the waters from and out of the said Bourne North Fen and Dyke Fen into the main cut or drain adjoining, or near thereto, then called the Forty-foot Drain, otherwise the Black Sluice New Main Drain; and also to deepen and improve the interior works for the more effectual drainage of the said several fens, called Bourn North Fen and Dyke Fen respectively, with powers for raising money for effecting such works and improvements; it was enacted, that the several persons who then were or thereafter should be owners or proprietors of fifty acres of land in that part of the manor and parish of Bourn, in the county of Lincoln, called Bourn North Fen and Dyke Fen, should be trustees for carrying the said Act into execution, and should be called "The North Fen and Dyke Fen Drainage Trustees."

Sect. 62 enacted, that every engine, machine, building,

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and work to be erected and made by the trustees under the powers of the said act, and every site of the same respectively; and all engines, machinery, buildings, sluices, pits, bridges, tunnels, culverts, cuts, sewers, drains, watercourses, dams, banks, headings, forelands, doors, outlets, and other works already made, or then existing, or provided for the drainage of the said lands called Bourn North Fen and Dyke Fen, and which should be thereafter made and provided for such purpose, and the right and property to and in the same, and the materials of which the same respectively should consist, should be, and were thereby vested in the said trustees; and it was provided that nothing in the said act contained should extend to or affect any engines, machinery, building, sluices, pits, bridges, tunnels, culverts, cuts, sewers, drains, watercourses, dams, banks, headings, forelands, doors, outlets, and other works then already made, or existing, or provided for the drainage of the said lands called Bourn North Fen and Dyke Fen, then vested in and under the control of certain commissioners commonly called the Black Sluice Commissioners, elected under the powers of the said Act of the 5th Geo. 3.

The 63rd sect. enacted, that it should be lawful for the trustees to purchase any land which they should consider requisite for any of the purposes of the said Act from any person who should be willing to sell the same, and to pay for the same out of the money to be by them received under the said Act, and to accept a conveyance of the same from the owner, and to hold such land in trust for the purposes of the said Act.

The 64th sect. enacted, that it should be lawful for the trustees in and upon any land in the said Bourn North Fen or Dyke Fen, not vested in the Black Sluice Commissioners above mentioned, to make, erect, and build, or to cause to be made, erected, and built, in such manner as they should deem most convenient, one or more,

not exceeding two, good substantial engine or engines, with all proper machinery for propelling a water-wheel or water-wheels to be worked by the power of steam, or such other power as the trustees should from time to time deem most expedient, together with all proper and convenient buildings, sluices, pits, and other necessary works, the united power of such two engines (if two should be erected) not to exceed the power of sixty horses; and also to cleanse, as occasion might require, the drains and watercourses in and through the said fens respectively, for the purpose of facilitating and accelerating the discharge of the waters from and out of the said fens into the main cut or drain called the Forty-foot, or Black Sluice New Main Drain, and also to make, and from time to time support, maintain, amend, repair, and improve, as occasion might require, the sluices, bridges, tunnels, culverts, cuts, sewers, and other works then already or thereafter to be made in, upon, and through the said fens, for effectually draining and preserving the same, and all and every such engine and engines, and machinery, buildings, sluices, pits, bridges, tunnels, culverts, cuts, sewers, drains, and watercourses, and other works of drainage, should from time to time, and at all times for ever thereafter, be supported, repaired, maintained, and renewed by the said trustees as occasion might require, by and out of the funds and monies to be from time to time raised by virtue and under the authority of the said Act in such manner as the trustees should think proper, and order or direct; and it was provided, that the trustees should, out of the money to be by them received under the said Act, make full compensation for all damage or injury which should be occasioned to any person by the making any of the works aforesaid, or carrying the said Act into execution; and in case of any dispute respecting the amount of compensation or damage, the same should be determined by some justice of the peace having jurisdiction. And it was pro-

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vided, that the water-wheels of any engine or engines should not exceed the diameter of fifteen feet; and in order to protect the works of the said main cut or drain, called the Forty-foot Drain, and the adjoining lands from any injury in consequence of the working of any such engine and machinery, it was by the 72nd sect. enacted, that a committee should be annually appointed of three of the commissioners acting in execution of the said Act of the 5th Geo. 3, in manner therein mentioned; and that such three commissioners should be a committee for inquiring into any case of emergency arising from any breach of the banks of the said main cut or drain called the Forty-foot Drain, or of the north bank of the rivers Glen or Bourn-Eau, or from a reasonable apprehension of the said main drain or rivers being so surcharged with water as to endanger by inundation the country below the parish of Bourn, and for ascertaining, by examination of engineers or surveyors, or by such other means as they should deem expedient, the necessity for stopping or suspending the working of any such engine or machinery, or moderating the operation thereof, and thereupon it should be lawful for the said committee men, or any two of them, or their deputies, to be appointed as thereinafter provided by writing under their hands, to be delivered as thereinafter mentioned, to order or continue the stopping or suspension of the working thereof, or the moderating the operation of such engine or machinery for such time as the emergency of the case should require, and to be specified in such order, and every such order should be observed by and be binding on the said trustees, and on all their engineers, officers, and servants. And powers were, by the 75th sect. of the said Act, given to the said trustees from time to time, as occasion should require, to rate, assess, tax, and charge all the several lands within the said fens called Bourn North Fen and Dyke Fen, which were then rated and charged, or liable to be rated or charged,

either towards the general or interior works, for the drainage and preservation of the said fens, in such sum or sums of money, not exceeding 20*s.* per acre, within or during the first year next after the passing of the said Act, and not exceeding 10*s.* in either of the two following years, and not exceeding 2*s.* 6*d.* per acre in any subsequent years.

And by the said bill it was further stated, that in the month of August, 1841, the said Bourn North Fen and Dyke Fen Drainage Trustees determined to widen a portion of the said drain, made under the direction of the said commissioners, to the extent of twenty-two feet, or thereabouts, beyond its then present width. That the said remainder of the 340 acres formed the northern or north-eastern boundary of the said drain; and that the said drain was under the jurisdiction of the Black Sluice Commissioners.

That on the 27th of August, 1842, the said trustees caused a letter to be sent to the said Black Sluice Commissioners, stating their intention to widen the said drain, and their willingness and intention to make compensation for any damage; and before any meeting of the said Black Sluice Commissioners could be held, another letter, dated the 6th of September, 1841, was written and sent to the clerk of the Black Sluice Commissioners, stating that they only proposed to widen and improve that portion of the leading drain therein described; and that it would be necessary to widen that portion to the extent of twenty-two feet, and offering to make compensation.

That on the 1st of October, 1841, a meeting of the said Black Sluice Commissioners was held; and, by vote of ten out of eleven commissioners, it was ordered, that the clerk of the said Black Sluice Commissioners should immediately give notice to the said Bourn Drainage Trustees, that the majority of the said commissioners present at the said meeting considered the widening of the said

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drain as an illegal interference with the drains under their exclusive control and jurisdiction, and that the said clerk should take proceedings to prevent the execution of such work; and that a copy of such order was received by the clerk of the said Bourn Trustees.

That, shortly before the 1st of October, the said Bourn Trustees employed workmen to widen the said drain, and had already cut away and removed upwards of 3200 square feet of the remainder of the said 340 acres.

That the said Bourn Trustees threatened and intended to continue to cut away and remove further portions of the said remainder of 340 acres, and to erect a steam-engine to pump the water arising in parts of the said manor and parish of Bourn into the said drain, and from which the water so pumped into the said drain would flow into the said South Forty-foot Drain, or New River. That William D. Bell was clerk to the said Bourn Trustees; and the bill prayed, that the defendant, W. D. Bell, and said Bourn Trustees, might be restrained by &c. from continuing to widen the said drain, and from cutting away or removing any part of the banks of such drain, or any part of the remainder of the said 340 acres of land vested in the plaintiffs and the other Black Sluice Commissioners. And that said Bourn Trustees might, by a like injunction, be restrained from erecting or putting up any engine or machinery for raising or pumping water into the said drain, and from pumping or causing to be pumped or raised any water into the said drain; and that they might be decreed to replace and restore so much of the said remainder of the said 340 acres as they had cut away and removed, and to place and leave the said drain in the same condition as the same was at the time they began to widen it, or to make compensation therefore, and the injury done or occasioned by removing part of the said remainder of the said 340 acres and widening the said drain; and that the amount of such compensation might be ascertained and

paid to the said commissioners, or as the Court should direct; and that all necessary directions might be given, and inquiries made, for the purposes thereinbefore mentioned.

A special injunction was moved for, and came on to be argued on the last day of *Hilary* Term, 1841.

The affidavits of the defendants stated that no injury or detriment would arise to the proprietors of lands in the jurisdiction of the Black Sluice Commissioners from the widening or pumping water into the said drain; and that benefit would accrue to the future lessees and occupiers of the said residue of the said 340 acres; and that it would not be possible, in any situation in which the said steam-engine could be placed, to supply and convey the water therefrom into the South Forty-foot Drain without cutting through or otherwise interfering with some of the drains or banks vested in the Black Sluice Commissioners; and that the land on which the steam-engine was erected did not form part of the remainder of the said 340 acres; that it would be impracticable to dig a new drain; and that the widening of the said drain had been effected or proceeded to the average depth of about three feet below the surface of the surrounding land (being about one-half of the requisite depth) along the whole length of such drain except about fifty-five yards.

Mr. *Richards*, Mr. *Koe*, and Mr. *Hildyard*, in support of the motion.—The question appears to be whether by the 4 & 5 Vict. the entire control of the Black Sluice Commissioners over the drain in question has been taken away, and whether their powers are now gone. It appears, however, that those powers are particularly reserved to them by the 62nd clause of the defendants' Act, and the Bourn Trustees are by that clause restricted from interfering in any manner with the rights of the Black Sluice Commissioners. The Act giving powers over the interior

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drainage to the Bourn Trustees did not empower them to take, but only to purchase lands, with consent, and the Act is therefore merely a permissive Act. It was never intended by the persons who applied for that Act that it should contain any compulsory clauses; and they were not in a condition to ask the legislature for such clauses, no notices having been given to the proprietors of the lands which such clauses, if granted, would affect. If an individual were to withhold his opposition on the understanding that a clause reserving to him his rights should be inserted in a bill, how could he be safe or rely on the security of such a clause if its effect were liable to be overridden by the insertion of a subsequent clause inconsistent with the former one? The Act of Parliament cannot be altered; and if the powers granted to the Bourn Trustees by this act of Parliament be insufficient for their purposes, their only remedy is to apply again to Parliament for an extension of their powers: *Blakemore* v. *The Glamorganshire Canal Navigation Company* (*a*); *Lee* v. *Milner* (*b*). There is no question of comparative injury, for what the Bourn Trustees wish to effect will cause irreparable damage; they can never reinstate the plaintiffs in their former position if the Act should be construed by a court of law to be in their favour, whilst the permitting the drains to remain in their present state will only leave them exactly as they have existed for seventy years past, and will subject the defendants to no further inconvenience than they have experienced and put up with during that period: *Kemp* v. *Brighton Railway Company* (*c*).

Mr. *Stuart* and Mr. *Walford*, contrà.—If the plaintiffs' construction be adopted the Act would be rendered nugatory; it is impossible for the defendants to reach the main drain without interfering with the drains vested in the

(*a*) 1 My. & Keen, 154. (*b*) 2 You. & Col. 611.
(*c*) 1 Railw. Cases, 147.

Black Sluice Commissioners. It is extremely improbable that the Act intended to give the defendants liberty to erect steam-engines, without the power of using them. In the 64th section power was given to the Bourn Trustees to cleanse, and they must therefore of necessity affect the drains of the plaintiffs. The 65th, 66th, and 67th sections all refer to precautionary measures to be adopted on certain events, which shewed the intention of the legislature to give the defendants some power over the drains vested in the Black Sluice Commissioners; whereas, if the Act were construed in the manner contended for by the plaintiffs, such precautionary clauses would be entirely useless. The intention of the legislature in the 62nd clause of the Act was to vest the legal rights only in the Black Sluice Commissioners, so as to determine against whom actions may be brought, but it never intended to give them the absolute right over the drains in question; but even if this construction be not the true one, a general saving inconsistent with the expressed intention of the legislature will not invalidate the Act; *Riddell* v. *White* (*a*); but such saving will be cancelled so far as it interferes with such expressed intention. The injury complained of by the Black Sluice Commissioners is in fact immaterial to the Black Sluice Commissioners. They will not suffer any individual loss; and if any damage is done to the land by over-widening the drains, the defendants will be the sufferers, inasmuch as the proceeds of that land are held, as it were, in trust for them, in order to satisfy the rate due from them to the Black Sluice Commissioners.

Mr. *Richards* replied.

THE VICE-CHANCELLOR.—I do not think that it is the duty of the Court to say in a decisive manner, that no con-

(*a*) 1 Anstr. 281.

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struction can be put on an Act of Parliament; but if it happen that an Act of Parliament is passed, with clauses in it at variance with each other, I think it is its duty to put the best construction upon it that it can, and, if it be possible, to elicit sense out of the Act. I admit that Acts of Parliament have been so constructed, that by reason of omissions in them the intention of the legislature could not be ascertained. I allude to an Act of Parliament which was passed some time ago, the subject of which was to repeal the then existing duties upon madder (*a*), and impose new duties. The Act was thus framed in express terms: it declared, "That from and after the passing of the Act, the several duties of customs imposed by certain Acts therein referred to should cease;" whereas it was intended that the duties of customs *on madder*, and no other duties, should be repealed. It was impossible for any court of judicature to fill up this omission; and the legislature in the same session passed a new Act for the purpose of rectifying the mistake. However, this case is not quite so strong as the one I have mentioned, although I certainly think that great difficulty has been introduced by the legislature into this Act of Parliament. If the 62nd section stood by itself, there would, perhaps, be no great difficulty, nor would any inconsistency necessarily arise; because it is only a declaration that an engine to be erected and made by the trustees, under the powers of this Act of Parliament, should be vested in them; but with a proviso, that nothing in the Act contained should extend to any engines &c. which were already vested in the old trustees, that is, the Commissioners of the Black Sluice; that is intelligible. But when I observe the proviso, "that nothing in this Act contained shall extend to or affect any engine &c., drains &c.," at present in and under the Black Sluice Commissioners, I must consider what is the con-

(*a*) See 54 Geo. III. cc. 26 and 27.

struction, in common sense and fairness, to be put on that clause, when I find the legislature, in a subsequent part of that Act, dealing actually with the drains &c. which were at that time vested in the Black Sluice Commissioners. The Act says, "It shall be lawful for the trustees upon any land, not vested in the Black Sluice Commissioners, to erect one or more, not exceeding two, engines." And, further, to erect engines with all proper machinery for propelling a water-wheel, to be worked by power of steam, with all proper and convenient buildings, and so on; and the power of the engines was limited. And it appears the object of this was, to enable water to be pumped into the Forty-foot Drain. The legislature declares it shall be lawful for the trustees, upon land not vested in the Black Sluice Commissioners, to erect engines, and then limits the diameter of the water-wheels to fifteen feet. And declares, that "it shall not be lawful for the trustees, by means of any steam-engine, to discharge any water from the North Fen and Dyke Fen into the main or drain called the Forty-foot Drain, at any time when the water in the said cut or drain shall exceed the height of the gauge or other datum line or height, to be ascertained and fixed as thereinafter mentioned." Here, then, it is quite clear that, in express terms, notwithstanding what is contained in the latter part of sect. 62, a power is given to the Bourn Trustees to erect two engines, of limited construction, with respect to the force of the wheel and the power of the steam, for the purpose of raising water into the drain which belonged to the Black Sluice Commissioners; and it further makes provision for the purpose of preventing injury, and directs an engineer shall be appointed, in a particular manner, to determine at what time the power of the engine shall be suspended; and, in order further to protect the improper use of the engine, there is that remarkable provision which is given in the 72nd section, for electing, as I understand it, out of the Black Sluice Commissioners, three persons to

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be a committee in order that the best judgment may be exercised upon that most important question. Now, am I to be told that upon the true construction of this Act of Parliament all that is to be considered as a nullity, and that it really was not the intention of the legislature to give the Bourn Trustees the power of erecting the engine for this purpose, with all those nicely considered and constructed limitations? It really appears to me, that such a construction cannot be put upon the Act of Parliament. I find the legislature has, notwithstanding the general words in the end of the 62nd section, given a power to the Bourn Trustees quite inconsistent with those words, and this at once proves to me, that the words which are found at the end of the 62nd section cannot and ought not to be taken in their naked and literal sense. If, then, that proposition is made out, as it appears to be by the different clauses regarding the steam-engine, the question is, what is to be done with respect to the particular language in the 64th section? After having given the power to erect the engines, then the Act gives a power "to cleanse, as often as occasion shall require, the drains and watercourses in and through the said fens respectively, for the purpose of facilitating and accelerating the discharge of the waters from and out of the said fens into the main cut or drain called the Forty-foot or Black Sluice Drain; and also to make, and from time to time support, maintain, and mend, repair, and improve, as occasion may require, the sluices, bridges, tunnels, culverts, cuts, sewers," (words which appear to me, in the first instance, to be words describing things of less importance than those things which are described by the previous words), "drains, and watercourses, and other works, already or hereafter to be made in, upon, or through the said fens, for effectually draining and preserving the same," so that you have a particular power as to the larger things, "the drains and the watercourses;" and then a power commencing, appar-

ently, with lesser things, and ending with general terms of the most comprehensive kind, which would comprehend, as I understand it, greater things. The next sentence begins, "and all and every such engine and engines and machinery in Black Sluices;" and directs, "that the works of drainage shall from time to time, and at all times for ever henceforth, be supported, repaired," and so on. So that it appears to me, that, taking the whole of the language together, there is, in express terms, given to the Bourn Trustees those powers "to make and improve," and so on, as I understand it, the drains, &c., which did exist. I am, therefore, at liberty, and actually bound to put this construction upon the Act of Parliament, viz. that the words which are restricted in the end of the 62nd section cannot be taken to cut down those powers which are given in express terms in the subsequent sections to which I have referred; and it appears to me the true construction of that 62nd section, or at least one construction, is, that it is meant to vest in the Bourn Trustees all those things specified in the first part of the 62nd section which were not vested in the Black Sluice Commissioners; and it would be a mischievous construction of this Act of Parliament to say, that those powers which the plaintiffs insist do not exist, are to be taken as things about which the legislature was pleased to enact words without any special reason. I think, therefore, that upon the true construction of this Act it is competent clearly for the Bourn Trustees to erect and put up any engine or machinery, that is, such engine or machinery as is within the limits of the Act of Parliament. There is no pretence that they are going to put up any with a wheel of more than fifteen feet diameter; but they are at liberty to put up an engine and machinery for raising and pumping water out of the Mill Drain to the Forty-feet Drain. And I also think upon the construction that I feel myself bound to put upon the Act of Parliament, that they are at liberty to widen the

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Mill Drain, and to cut away or remove such parts of the bank as may be necessary for properly widening it, so that I cannot grant the injunction the plaintiffs ask. Let the motion stand over, the plaintiffs being at liberty to take such steps as they may be advised for determining the legal right, with liberty for both parties to apply.

The motion was afterwards, on the 26th February, renewed by appeal before the Lord Chancellor.

Mr. *Richards*, Mr. *Koe*, and Mr. *Hildyard*, in support of the motion.

Mr. *Stuart* and Mr. *Walford*, contrà.

THE LORD CHANCELLOR.—I do not find that there are any works of drainage applicable to Bourn North Fen and Dyke Fen, except those works which are vested in the Black Sluice Commissioners. The preamble of the Act says, "And it is also desirable, for the purposes of the Act of Parliament, that they should have power to deepen," and so on, "for the more effectual drainage of the said several fens called North Bourn Fen and Dyke Fen respectively." The Act then gives them power to repair, amend, and improve, as occasion may require, the works that are enumerated. Now there are no works to which those words would apply, except the works in question, viz. those belonging to the Black Sluice Commissioners. Yet that seems at variance with the proviso, "That nothing in the Act contained should extend to or affect the machinery belonging to the Black Sluice Commissioners." It is extremely difficult to reconcile one clause with the other. And it is, in my opinion, necessary that the opinion of a Court of law should be taken on the construction of the Act of Parliament, and to get evidence, which may be examined and cross-examined, of the state of the works

at the time this Act of Parliament passed, or of their actual state.

The only question that remains for my consideration is, what should be done in the meantime. It does not appear that there are any contracts for extending the drain in question; and the only question is, whether the defendants should be allowed permanently to alter the whole character of the property that is vested in the Black Sluice Commissioners, before an action at law is tried for the purpose of determining the right. Now, what is the state of things? The state of things is precisely what it has been for many years past, therefore I cannot suppose any great and permanent injury will result from delaying these works until the right is established; whereas, on the other hand, the whole character of the works and property will be altered, and permanently altered, if the works are carried on; and although it may ultimately be decided that the defendants have no right to alter those works, yet they can never be restored to their original condition. On the one hand, then, a permanent change would be effected before the right is decided; and, on the other, the thing would be left in the very state in which it has existed for several years past. Therefore, it appears to me upon the balance, the right should be tried before any further alteration is made in the state of the property. I shall not, however, order an injunction without putting the plaintiffs under very strict limitations.

An action of trespass must be tried at these Assizes, in order that, if any question of law arises, it may be decided by the Court out of which the record issues the next term, and the declaration must be delivered within a few days; and, under these circumstances, I do not think it right to express any opinion as to the construction of the Act.

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ROLLS COURT.

Feb. 16. GORDON *v.* THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY, and Others.

A clause in a railway Act enacted, "That it shall not be lawful for the Company to make or establish any public station, yards, wharfs, waiting, loading or unloading places, warehouses, or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or cattle, or any goods, articles, matters or things, upon the estate of R. G., his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said R. G., his heirs or assigns, for that purpose had and obtained."

BILL filed 1st February, 1842, stated that plaintiff was tenant for life without impeachment of waste (subject to a term for securing £500 per annum for the separate use of his wife) of a mansion and lands in the parishes of Kemble and Poole Reynes, containing 3000 acres and upwards. That in 1836 a bill was introduced into the House of Commons for authorizing the making a railway from Cheltenham and Gloucester, with a branch to Cirencester, there to join the Great Western Railway. That the main branch intersected plaintiff's estate for four miles, and passed within 260 yards of the mansion-house; and that the branch railway to Cirencester was to commence at a point less than 650 yards from the said mansion. That plaintiff entertained apprehensions that great injury would be occasioned by the intersection of the estate, and by the noise of the trains, and by the additional noise and inconvenience which might arise from the establishment of any railway station. That plaintiff opposed the said bill in committee for eleven days, when an agreement or contract was entered into, dated the 21st March, 1836, by which it was, among other things, stipulated that no public station should be established without permission of

R. G. filed a bill to restrain the Company from using an engine-house and other buildings erected by them within the prescribed limits:—*Held*, on demurrer, that the word "public," did not necessarily override the whole sentence; and that if it did, every thing connected with the railway must be considered as for the public use.

The injunction in this case was granted, but with liberty to use the erection as theretofore, upon their undertaking to erect no more, and to apply for a rehearing, or to prosecute an appeal to the House of Lords.

Semble.—A party will not be precluded from relief by acquiescence in what he may be led to consider a mere temporary violation of his right, when no evidence is given of expense incurred by another party in consequence thereof.

the plaintiff. That the bill passed into an Act; and by the 15th clause it was enacted, that it should not be lawful for the said Company to make or establish any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things, upon the estate of the said Robert Gordon, his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said Robert Gordon, his heirs or assigns, for that purpose had and obtained. That the said Company, previous to the 1st of June, 1841, made their railway from its junction with the Great Western Railway to a point about 100 yards beyond the point of junction with Cirencester Branch.

That on the 4th of June, 1841, plaintiff visited Kemble House, and found that the Company had made a well and water-tank, and soon after had erected a cottage and engine-house within the limits prescribed by the Act; and that in the latter end of that month, or the beginning of July, plaintiff had an interview with one of the directors, who afterwards by letter informed the plaintiff that he had no power to interfere with these erections, all that department being left to a committee.

On the 2nd of September following, plaintiff visited Kemble House again, and found another cottage and stable, all built principally of wood, but within the prescribed limits, and on that occasion he complained to the principal engineer, who informed him that the said engine-house and other buildings were intended for a temporary purpose only. On the 26th of October, a building of a permanent character was commenced, which was intended as a depôt for coal, coke, and ashes. That plaintiff caused part of the earth which had been dug out for the foundations to be thrown back, and the said Company shortly afterwards discontinued the same building; and

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on the 27th December, 1841, plaintiff wrote to the directors, requesting a removal of all the buildings, and referring them to the 15th section of the Act, and complaining of a violation of the statute. In answer to which application the plaintiff received a letter from the secretary of the Company, stating, that the directors were not aware of any violation of the agreement, or of the provisions of the Act of Parliament. That the engine-house, &c., were distant, considerably less than fifty yards from part of the lands of Mr. G., not purchased by the Company, and at a distance of less than 700 yards from Kemble House. That six or eight engines were generally kept at the engine-house, and part of the engine-house was fitted up as a forge. That a pathway had been made, and several persons permitted to alight there. The bill charged great inconvenience from noise, and also danger of trespass; and it prayed that the said Cheltenham and Great Western Railway Company, their agents, servants, and workmen, might be restrained from using the said engine-house, cottages, and other buildings, for depositing, receiving, loading, or keeping any passengers or cattle, or any goods, engines, or other articles, matters, or things. And that the said Company might be restrained from continuing the erection of the building so commenced, and from making, erecting, or establishing, upon the lands of plaintiff, or within fifty yards of the boundaries thereof, any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things, and for general relief.

To this bill the defendants put in a general demurrer. The plaintiff set down the demurrer for argument, and also gave notice of a motion for an injunction according to the prayer of the bill.

Mr. *Turner* and Mr. *W. P. Wood* in support of the de-

murrer.—The equity, if any, arises either from the contract or from the Act of Parliament, but it does not appear that there is an infringement of the provisions either of the one or of the other. The contract only provides against a public station, and that provision is carried into effect by the Act of Parliament: The word "public" applies to the whole clause, and the words "make and establish" are particularly the words applicable to a public work. In no other part of the Act the word "public" is made use of, and it is intended in this particular place to carry out the meaning of the agreement. The acts charged in the bill to be a violation of the contract are, the building an engine-house and cottages, a tank and stable, and the setting down letter-carriers and other persons; but these allegations do not shew that the buildings are used for any other than the private purpose of the Company. And it was decided in the *Eton College* v. *Great Western Railway Company* (*a*) that a prohibition against the formation of a station does not preclude a Railway Company from taking up and setting down passengers, and there is no reference in the bill to the user by the public, either of the bridge or of the ground. The words "goods, articles, matters, and things," must be considered to mean things *ejusdem generis* as the principal matters before mentioned, and they are all overridden by the word "public." Although, indeed, the erection of the buildings may not be within the meaning of the Act, it is now too late to apply to restrain the user when they are erected. *Deere* v. *Guest* (*b*). Substantial damage must be shewn before the Court will interfere, and there is nothing in the bill to shew any deterioration of property. Added to this, the plaintiff has, by acquiescence, precluded himself from any relief in equity; for, although he was aware of the erection of the buildings in June, he laid by until the end of the year before he

(*a*) Antè, Vol. 1, p. 200. (*b*) 1 My. & Cr. 516.

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commenced any proceedings against the Railway Company. *Semple* v. *London and Birmingham Railway Company* (*a*).

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Goldsmid*, contrà. —The scheme of this Act is the formation of the railway, and for that purpose it gives the directors power to take lands, &c. Previous to the 15th clause, there is no reference to carrying passengers or goods for hire, and the object of the legislature was to give powers for the making a railway which should be open for the use of the public, and of which they might avail themselves either by running engines or otherwise. There are no private stations, and every thing connected with the railway is open to the public. The 165th, 166th, and 167th sections of the Act support this view of the case. According to the defendants' construction of the Act, if the directors do not intend to be carriers, they might make any manufactories, any settlement they pleased on the plaintiff's land. The words "other buildings or conveniences" are particularly applicable to the present state of things: and the word "station" *ex vi termini*, means a public station, and is so explained by the affidavit of an engineer in the Eton College case (*b*). There is no ground for charging the plaintiff with acquiescence, for he was lulled into security by the declaration of the principal engineer, "that the buildings were only for a temporary purpose." This is not that kind of acquiescence which induces the Court to refuse relief. The plaintiff has not come *ex parte* to the Court, nor has he stood by and permitted the Company to incur one farthing of expense. The only reason for not filing his bill sooner was his desire to avoid litigation, and so long as his right was not disputed, he did not think it necessary to interfere; but, immediately upon his right being questioned, he instituted proceedings.

(*a*) Antè, Vol. 1, p. 120. (*b*) Antè, Vol. 1, p. 214.

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MASTER OF THE ROLLS.—The Court looks upon acquiescence according to the circumstances of each case, and I do not consider that any such acquiescence has been shewn in this case as would prevent the Court from interfering until the legal right has been determined. If I allow the demurrer, the plaintiff will be precluded altogether from, and deprived of relief; and I think that the case of acquiescence is not sufficiently strong to warrant such a course. The defendants could not have been misled by the plaintiff's conduct, and it appears to me that the plaintiff was lulled into security by the declaration of the engineer, until the letter of the 31st of December. The construction of the act of Parliament is not very clear; and although the inclination of my opinion is not to allow the demurrer, I will reserve my judgment until I have heard the motion for an injunction.

The motion for an injunction was then heard.

Mr. *Pemberton*, Mr. *Kindersley*, and Mr. *Goldsmid*, in support of the motion.

Mr. *Turner* and Mr. *Wood*, contrà.

The motion was supported by affidavits, verifying the statements in the bill, and stating that Mr. Gordon withdrew his opposition, on the understanding that no buildings of any kind were to be erected on his estate, or within fifty yards thereof.

THE MASTER OF THE ROLLS.—In this cause the plaintiff, Mr. Gordon, alleges that the defendants, the Cheltenham and Great Western Union Railway Company, have committed an act in violation of his rights, under the act of Parliament by which the Company is constituted. He has filed this bill, which states the act of Parliament, the

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contract under which the provisions in that act which relate to him were made, and the facts which he alleges to be a violation of his rights; and he has prayed for an injunction to restrain the Company from committing those acts. A motion is made for an injunction. The defendants have put in a general demurrer, denying that the plaintiff is entitled to any equity, or to the interposition of this Court for his protection. With regard to the demurrer, the argument has principally turned upon the words of the act of Parliament, and particularly upon the single word "public," which in the clause, which is material in this case, is alleged to have a particular meaning, and to extend to every word which is contained in the clause (*a*). [His Lordship read the 15th section].

Upon part of the line of the railway, which constitutes a portion of the estate of Mr. Gordon, the defendants have erected a wooden building, which they call an engine-house, for the deposit and placing of engines to be used on the railway. In that building they have made a forge, and have there provided the necessary means of repairing engines, so that it is made a place for the deposit of engines, and for the repair of engines, to be used on the railway. Besides this they have erected a stable and two cottages — they have made a tank of water at a short distance. Mr. Gordon alleges, that these are conveniences for the deposit of goods, articles, matters, and things. And that this is contrary to the intention of the act. The defendants say otherwise. They say that the word "public" has reference to every word in the clause,—that it means a place, a building, a convenience to which any person constituting a portion of the public has a right directly to resort,—but that here, the place, which is made for the deposit of engines, is not directly for the use of the public,—that no person, being a part of the public only, has a right to resort to this engine-house—or has a right to go into it—

(*a*) Antè, p. 800.

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but that it is meant and placed there for what is called the private use of the Company, in keeping those things which are necessary for preserving or keeping up the railway for the use of the public. Now it is very much to be wished, undoubtedly, that clauses in acts of Parliament were expressed with more precision than they often are. This being a case of demurrer, it ought not to be allowed, if there is any relief to be had upon the bill. I certainly cannot say that there is no relief to be had upon the bill, unless I entirely adopt the construction contended for by the defendants. Upon reading this clause, and reading it with reference to all the other clauses in which there are similar expressions used, particularly the 17th and 68th (*a*), I cannot satisfy myself that the word "pub-

(*a*) Sect. 17 enacts, "that, for the purposes and subject to the provisions and restrictions of this act, the said Company, their agents and workmen, and all other persons by them authorized, are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act empowered to take or use; and in or upon such lands, or any lands adjoining thereto, to bore, dig, cut, embank, or sough, and to remove or lay, and also to use, work, and manufacture any earth, stone, rubbish, trees, gravel, or sand, or any other materials or things which may be dug or obtained therein or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing, or using the said railway, and other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of this act; and also for the purposes and according to the provisions and restrictions of this act, to make or construct in, upon, across, under, or over the said railway or other works, or in, upon, across, or under or over any lands, streets, hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences; and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing-places, engines, and other buildings, machinery, apparatus, and other works and conveniences as the said Company shall think proper; and also to alter the course of any rivers,

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lic" is to be applied to every part of this subject, or that if it were so applied, I could attribute to it the meaning the defendants contend for. The sentence "erecting

canals, brooks, streams, or watercourses as may be necessary for constructing and maintaining tunnels, bridges (whether temporary or permanent), or passages over or under the same; and also to divert or alter the course of any rivers or streams of water, roads or ways, or to raise or sink any such rivers or streams, roads or ways, in order the more conveniently to carry the same over or under, or by the side of the said railway, and to make drains or conduits into, through, or under any lands adjoining the said railway, for the purpose of conveying water from or to the said railway, and also from time to time to alter, repair, or discontinue the before-mentioned works, or any of them, and to substitute others in their stead, and to do and execute all other matters and things necessary or convenient for making, maintaining, altering, or repairing and using the said railway and other works by this act authorized, they the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said Company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used, or injured, for all damages to be by them sustained in or by reason of the execution of all or any of the powers hereby granted, and this act shall be sufficient to indemnify the said Company and all other persons for what they or any of them shall do by virtue of the powers hereby granted."

Sect. 68 enacts, "that it shall be lawful for the said Company, and they are hereby empowered to contract with any person or corporation (who shall be willing to sell the same) for the purchase of any lands, not exceeding in the whole forty statute acres, in addition to the lands hereinbefore authorized to be taken and used in such places as shall be deemed eligible for the purpose of making and providing additional stations, yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading, or keeping any cattle or any goods, articles, matters, or things conveyed or intended to be conveyed upon the said railway, or for making convenient roads or ways thereto, or for any other purposes whatsoever, connected with the undertaking by this act authorized, which the said Company shall judge requisite; and it shall be lawful for all persons and corporations, including especially such persons and corporations as are hereinbefore capacitated, to sell and convey other lands, and to release rents and other charges, and for the purposes of this act to sell or grant and convey to the said Company and their successors any lands whatsoever, for the purposes hereinbefore mentioned, or any of them, and to release rents and other charges thereon, or to enfranchise

conveniences for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things," does not appear to me in the necessary construction of this clause to be governed or affected by the word "public." It is however certainly ambiguous; and I cannot be satisfied that if the word "public" does extend to all the words here used, it is, therefore, to be considered as exclusively applicable to those things used by the Company in the discharge of what may be called the public duty they have undertaken. By "public," I presume the defendants mean no more than their customers; they mean any persons among the public who may choose to make use of this railway. In that sense, no doubt the public have a right to have the road kept in proper repair, and to have engines duly appointed, for the purpose of a convenient traffic. I think the word "public" may be properly extended to all such buildings, conveniences, matters, and things, as are used by the Company for preparing, keeping, and repairing those machines and things which are required to keep the road and the machinery on the road in order for the use of the public: and that there is nothing they have, or have a right to have, which is not for the public use. Thinking, therefore, that the word "public" does not necessarily extend to all parts of this sentence, and, if it did, that it does not admit of the construction which is contended for, I cannot say the plaintiff is not entitled to the protection of this Court; and I must therefore overrule the demurrer.

Then comes the question of the motion. The motion is to restrain the defendants from using the buildings they have already erected, and from erecting other buildings. Various objections are made to this. On the first objection, depending, as did the argument on the demurrer, on

any such lands being of copyhold or customary tenure, in the same manner as is hereinbefore directed concerning the lands to be taken for the purposes of making the said railway and other works by this act authorized."

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the construction of the act of Parliament, I have already expressed my opinion, admitting however that the case is open to some perhaps considerable doubt.

The next objection is, that the plaintiff has acquiesced so long as not now to be entitled to the protection of the Court. That he knew of what was going on seems to me beyond all doubt. I think the knowledge of his agent must be considered as his knowledge. But, at every period of the work, when these erections were being made, it appears to me perfectly clear he was objecting to the proceedings. The application he made to the trustees was in the nature of objection; the conversation he had with Mr. Brunel was in the nature of objection; and, in fact, it must be assumed, I think, that if there had been anything which the Company thought to be acquiescence, I should have heard of it in a very different form from that in which it is suggested to me—I should have had it in evidence. It is next objected that there was delay in filing the bill. Was that a delay which gave the defendants any right, or deprived the plaintiff of any right? He saw something going on which he objected to—which he considered to be a violation of his rights under the act of Parliament. He was told in the month of September, that it was a temporary erection only. Would it have been correct on his part—would it have been right in him, immediately to commence litigation on the subject, or, rather, was it not a proof of his moderation and desire to accommodate the Company, when he acquiesced in what would be a mere temporary violation of his rights, in the expectation that it would only last for a short time? The first time, as far as I can understand from any evidence now before me, that the Company claimed this right under the act of Parliament, was by a letter on the very last day of the last year. In a month from that time the plaintiff has his bill on the file. I cannot imagine how it is supposed that this is to be considered an acquiescence, so as to deprive him of any right

whatever, or to give the defendants any right they would not have had if such acquiescence had not taken place. Certainly they have not given evidence to shew that they incurred any expense on the faith of his acquiescence. I am of opinion, therefore, there is no such acquiescence as to deprive the plaintiff of any right to which he is entitled.

The next point for consideration certainly does appear to me to be a very material one; that is, what are the inconveniences to which the parties would be subject, supposing I were to grant this injunction. With regard to that, the length of time which has elapsed is not immaterial. The inconveniences to which the Company may be subject are, I must say (looking at these affidavits), stated in a manner which is extremely unsatisfactory. It has been argued, that if this injunction were granted the consequence will be, that the line of railway, being on a part of this road, cannot be safely used; and that it will be inconsistent with the safety of the persons who may travel on it: and that the public will be greatly inconvenienced by the stoppage of the traffic on other parts of the railway. Looking at the amount of inconvenience that Mr. Gordon alleges, and the amount of inconvenience on the other side, which in argument is so strongly urged, but in evidence so weakly supported, it appears to me that I must delay granting this injunction until this matter has been further investigated.

And this brings me to the last point in this case, which is, whether there ought to be any proceeding at law, either before the injunction is granted, or a direction to do it as a condition on which the injunction is granted. The Court has regard to the circumstances of each case. Sometimes it finds it most subservient to the justice of the case to grant the injunction at once, but puts the party who has obtained it on terms of bringing an action to support a right, which has appeared so strong to a Court of equity that it has acted on it at the time, but still required the

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corroboration of the decision of a Court of law; and sometimes from the great inconvenience, and at other times from the extreme doubt, it has considered it would be best on the whole that the injunction should be suspended till the right at law should be determined. Before I decide which of these courses I shall adopt I should wish to be more accurately informed by affidavit of the injury which the Company would suffer if stopped by injunction. At the same time, I will give the plaintiff the opportunity of seeing those affidavits, and making others, if he shall think it advisable.

Feb. 21. The MASTER of the ROLLS, after mentioning that affidavits had been delivered to him on both sides, said—I am afraid an injunction cannot be put on these parties now without occasioning considerable inconvenience to all who employ the railway. In this as in almost every case of granting an injunction to prevent the use of things which are devoted to the public use, the consideration arises on which side the greater inconvenience will be suffered until the question can be finally determined. I have looked anxiously through these affidavits, but can find no fixed limit during which this inconvenience to the plaintiff must necessarily continue, and this seems to me the strongest point against the defendants. They have leased this line for a series of years to the Great Western Railway Company, and there is no obligation upon them to finish their line for two or three years to come.

I think that, upon the motion, the plaintiff is entitled to the injunction; but, nevertheless, I will give the defendants liberty, (upon their application and undertaking to present a petition of rehearing to the Lord Chancellor, or an appeal to the House of Lords), notwithstanding the injunction, to use the present buildings in the same manner as they have hitherto done, undertaking not to use them in any other manner, or to erect any other buildings.

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Feb. 26.

A testator was a registered owner of certain shares in the Eastern Counties Railway Company, in respect of which three calls were made in his lifetime, and seven after his death, but nothing was paid.

In taking the account of his estate before the Master, the Company put in a claim for the amount of such calls, and interest, and the Master having allowed the claim as to the three calls made in the testator's lifetime, but disallowed it as to the seven calls made after his decease, exceptions were taken to the Master's report by the Company, as to the claim disallowed, and by the executors, as to the claim allowed:—*Held*, that the testator's estate was liable to pay, as well the calls made before as those made after his decease, with interest at £5 per cent.

THE suit was instituted for the purpose of administering the estate of T. B. Fyler; and by the report of the Master made in pursuance of a decree in the said suit, on the 10th of August, 1841, it was stated that a charge had been brought in on behalf of the Eastern Counties Railway Company, together with two affidavits of J. B. O.; by one of which affidavits the said J. B. O. deposed that he was the transfer clerk of the Eastern Counties Railway Company; and that he was enabled to state who were the proprietors of the shares in the capital stock of the said Company; and that the testator T. B. F. was a proprietor of thirty shares in the capital stock of the said Company in the said undertaking, at the respective times of making the calls, and when the same became due; and that none of the calls exceeded £8 upon each share; and that there was an interval of three calendar months between the date of the call next previous to the first of such calls, and also between every two of such calls; and that twenty-one days' notice of every such call was given by advertisement; and that the principal sum due on such calls amounted to the sum of £660; and that the said Company claimed a further sum for interest on the amount of such calls respectively from the day they became respectively due, up to the day of payment; and that the said sum of £660 and interest still remained due to the said Company; and by the other affidavit the said J. B. O. deposed, that T. B. Fyler, the testator, was an original subscriber for thirty shares in the Eastern Counties Railway Company, and executed the parliamentary contract in respect of such shares; and that after the passing of the act of Parliament (6 & 7 Will. 4, c. cvi) incorporating the subscribers to the

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undertaking, the said T. B. Fyler applied to, and was duly registered in, the books of the said Company, in respect of thirty shares; and that thirty shares were issued to the said T. B. Fyler in consequence of his subscription to the said undertaking.

And by the said report it was further stated that by the said charge, the said Eastern Counties Railway Company had claimed that the testator T. B. Fyler was at the time of his death indebted to them in the sums in the schedule (*a*) mentioned; and that the said master having considered thereof, and looked into the act of Parliament, and particularly into the 163rd section (*b*), and it having

(*a*) The schedule above referred to:—

1st Call,	made	26th Sept.	due	26th Nov. 1836 ..	£30
2nd do.	„	14th Aug. 1837,	„	16th Oct. 1837 ..	30
3rd do.	„	5th Feb. 1838,	„	8th March, 1838..	60
4th do.	„	22nd May,	„	16th June.....	75
5th do.	„	11th Sept.	„	10th Oct.....	75
6th do.	„	18th Dec.	„	14th Jan. 1839 ..	90
7th do.	„	2nd April, 1839,	„	29th April	90
8th do.	„	4th Sept.	„	30th Sept.	60
9th do.	„	12th Dec.	„	10th Jan. 1840 ..	90
10th do.	„	25th July, 1840	„	17th Aug.	60

(*b*) Sect. 163. "And whereas in cases in which proprietors of shares in the said undertaking shall die, or being females, marry, or become insolvent or bankrupt, or go out of the kingdom, or shall transfer their right and interest therein to other persons, and no register shall have been made of the transfer thereof with the clerk or secretary of the said company, it may not be in the power of the said Company to ascertain who are the proprietors of such shares, in order to give to them, or to their respective executors, administrators, husbands, successors, or assigns, notice of calls to be paid on such shares, or to maintain actions, suits, or other proceedings against them, or against their respective executors, administrators, husbands, successors, or assigns, for a recovery of the same, be it therefore enacted, that in all cases where the right of property in any share of the said undertaking shall pass from the original proprietor thereof to any other person or corporation by any other legal means than by a transfer or conveyance thereof, duly made and executed as herein provided, and such declaration as hereinbefore in that behalf directed shall have been transmitted to the clerk or secretary of the said Company, then and in any of the cases aforesaid after twenty-one days' notice in writing

been admitted that the said testator departed this life on the 4th of March, 1838, having made a will disposing of his personal and other property as therein mentioned, and that no register had been made of any trans-

shall have been given, under the hands of two directors, or by the clerk or secretary of the said Company, to the person or corporation stated or claiming in such declaration to be the then proprietors of such share, or delivered to some inmate of the last or usual known place of abode of such person, or of the clerk or other principal officer of such corporation, to pay his or their proportion of money to be called for, and such person or persons shall not have paid such his or their proportion as aforesaid, it shall be lawful for the said Company, at any general meeting or special general meeting after the expiration of such notice, to declare every such share forfeited; and in such case the same shall be forfeited, and shall or may be sold or disposed of in such manner, on such evidence of title, and with such powers, and with such indemnity to purchasers, as in other cases of sales of shares forfeited for the non-payment of calls thereon; or such shares may, at the option of the said Company, be consolidated in the general fund of the said Company. And in case there shall be no such declaration made as aforesaid, then such notice as is hereinbefore directed to be given shall be served upon or delivered to some inmate of the last known place of abode of the executors or administrators of such proprietor so dying, or of the husband of such female proprietor so marrying, or of the assignees or trustees of such proprietor so becoming bankrupt or insolvent, or in the event of the share having been disposed of as aforesaid, of the last proprietor appearing in the books of the said Company to have been possessed of the same; and in case the last or usual place of abode of any such proprietor cannot be ascertained upon inquiry, or in case a proprietor of the share shall be out of the kingdom, such notice shall be inserted in the London Gazette, and in one newspaper circulated in each of the several counties through or into which the said railway is intended to pass. And in all such cases, and after such notices in default being made, the said shares shall be forfeited, and may be sold or consolidated with the general fund of the said Company in manner aforesaid; and the like evidence of title shall be sufficient on any sale, and the like indemnity to the purchaser shall exist as in other cases of sales on account of the non-payment of calls. Provided always, that in the cases of proprietors being abroad, the shares shall not be forfeited until the expiration of six calendar months after the day on which such notice shall have been delivered to some inmate of their last known or usual place of abode in England, if any such shall be known, or if not known, inserted in the London Gazette and other newspapers, as aforesaid."

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fer of such shares, and that no declaration, as in the said 163rd clause is mentioned, had ever been transmitted to the said company by any person or persons stating or claiming to be new proprietors of such shares of the said T. B. Fyler, the said Master was of opinion that the Company had no right to sue for the calls made since his death, and therefore he had allowed such charge as to the two calls of £30 each, made on the 26th of September, 1836, and the 14th of August, 1837, and the call for £60 made on the 5th of February, 1838, and the interest thereon; and had disallowed the said charge as to the said other calls which had been made since the said testator's death.

To this report the Eastern Counties Railway Company took the following exceptions.

1st. For that the said Master has, by his said separate report, stated his opinion to be that the said Company have no right to sue for the calls in the said report mentioned made since the testator's death; whereas the said Master ought not by his said report to have stated any opinion, or come to any finding adverse to the right to sue for the said calls.

2nd. For that the said Master, in and by his said separate report, hath disallowed the charge of the said Company as to the said calls which were made since the death of the said testator; whereas the said Master ought not to have disallowed the said charge as to such calls.

3rd. For that the said Master has, by his said separate report, disallowed the charge of the said Company as to the several sums of £75, £75, £90, £90, £60, £90, and £60, thereby claimed for calls; whereas the said Master ought not to have disallowed such charge as to such sums, but ought to have allowed the same as to all such sums, or some of them.

4th. For that the said Master hath, by his said separate report, disallowed the charge of the said Company for interest on the several sums in the last exception mentioned;

whereas the said Master ought not to have disallowed such charge as to such interest, but ought to have allowed the same wholly, or at least in part.

5th. For that the said Master ought, by his said separate report, to have allowed the charge and claim of the said Company for such part of the sums of money subscribed for by the said testator, as was from time to time called for by the directors of the said Company under the powers of the Act in the said report mentioned; whereas the said Master has disallowed the charge and claim of the said Company as to certain parts of such monies.

6th. For that the said Master has, by his said separate report, stated that it was admitted before him that the said testator had made a will, transferring his right and interest in the shares in the said report mentioned to other persons; whereas the said Master ought to have found only that it was admitted before him, that the said testator had made a will, purporting to transfer his right and interest in the said shares to other persons.

The executors of the said testator also took the following exception to the said report:—That the said Master ought not in and by his said report to have allowed such charge as to the said three calls, or any or either of them (*a*).

Mr. *Wigram* and Mr. *H. A. Bruce*, in support of the exceptions taken by the Company.

Mr. *Koe* and Mr. *Hale*, for the exceptions taken by the executors; and,

Mr. *Russell* and Mr. *R. W. E. Forster*, for parties interested under the will.

(*a*) The sections referred to in the argument were as follows:—

Sect. 4. "That the several persons who have subscribed or who shall hereafter subscribe or agree to advance or pay any money for or towards the said undertaking shall, and they are hereby re-

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On the part of the Company, a statement of the case only was considered necessary, and the argument of the executors is stated in the judgment.

quired to pay the sums of money by them respectively subscribed or agreed to be paid, or such parts thereof as shall from time to time be called for by the directors of the said Company, under the powers of the act, at such times and places and to such persons as shall be directed by the directors; and in case any person shall refuse or neglect to pay as aforesaid the money by him so subscribed for, or the part thereof so called for, it shall be lawful for the said Company to sue for and recover the same, with full costs of suit, in any Court of law or equity, together with interest on every such unpaid sum of money at the rate of £5 per cent per annum from the time when the same is directed to be paid as aforesaid up to the day of the actual payment thereof."

Sect. 156. "That the clerk or secretary of the said Company shall, in some proper book to be provided by the said Company for that purpose, enter and keep a true account of the places of abode of the several proprietors of shares in the said undertaking, and of the several corporations and persons who shall from time to time become proprietors thereof, or entitled to any share therein, and every such proprietor (or in the case of a corporation, &c.) may at all convenient times have recourse to and peruse such book gratis, and may demand and have copies thereof, or of any part thereof, paying to the said clerk or secretary at and after the rate of 6*d.* for every 100 words so copied."

Sect. 157, after reciting that by the death of, or by other events happening to proprietors, or by marriage of female proprietors of shares in the said undertaking, it might be difficult to ascertain to whom such shares, or the dividends arising or becoming due on such shares, might belong or ought to be paid, enacts, "That in all cases where the right property in any share in the said undertaking shall pass from any proprietor thereof to any other person or corporation by any other legal means than by a transfer or conveyance thereof duly made and executed, a declaration in writing shall be made by some credible person before some Master or Master Extraordinary in the High Court of Chancery, or one of his Majesty's justices of the peace, stating the manner in which such share has been passed to such other person or corporation, and such declaration shall be transmitted to the said Company, who shall thereupon enter and register the name of every such new proprietor in the register-book or list of proprietors of the said Company; and the said Company shall not be bound to see to the execution of any trust, whether express or constructive, to which any such share shall be subject or liable; and before such declaration shall have

VICE-CHANCELLOR K. BRUCE.—The question is, not whether the executors ever have been, or are, or ever will

been transmitted, and such entry made as aforesaid, no person or corporation to whom any such share shall have passed shall be entitled to receive any part of the profits of the said undertaking, or to vote or exercise any of the privileges of a proprietor in respect of such share."

Sect. 159. "That the Directors of the said Company shall have power from time to time to make such calls of money from the proprietors of shares in the capital stock of the said Company, who shall not have already paid the full amount due or payable in respect of their respective shares, to defray the expense of the said railway, and carry on the same as they from time to time shall find necessary, so that no such call shall at any one time exceed the sum of £3 upon each share, which any person or corporation shall be possessed of or entitled unto in the said undertaking; and that there shall be an interval of three calendar months at the least between every two calls, and twenty-one days' notice at the least shall be given of every such call by advertisement, in &c.; and the several proprietors of shares in the capital stock of the Company shall, and they are hereby required to pay the sum or sums of money subscribed for or payable in respect or on account of their several and respective shares, or so much thereof as shall not have been previously paid up by such calls or instalments, to such person or persons, at such time or times, at such place or places, and in such manner as the directors of the Company shall from time to time direct or appoint, for the use of the said undertaking. And if any proprietor of any such share shall not from time to time pay the rateable proportion, or call, or instalment due in respect of each such share, to the person, at the time and place, and in the manner to be appointed for payment thereof, then and in such case, and as often as the same shall happen, such proprietor shall pay interest for the amount which shall be so unpaid after the rate of £5 per centum per annum from the day appointed for payment thereof up to the time when the same shall be actually paid. Provided that no proprietor of any share in the capital stock of the said Company shall, under the authority of this act, be called upon, or be liable to pay any greater sum of money than with the principal money already paid on account of the subscription for such shares will amount to the sum of £25 in respect of each such share, over and besides any interest paid or payable by reason of default in payment of calls as aforesaid."

Sect. 160. "Provided always, that in case any proprietor of a share or shares in the capital stock of the Company shall neglect or refuse to pay the rateable proportion, or call, or instalment due in respect of each share taken or held by him, to the person, at the time and place, and in the manner to be

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be personally liable. No such question is raised, or is now before the Court. The question is, whether the testator

appointed for payment thereof, together with interest (if any) which shall accrue for the same, for the space of two calendar months after the day appointed for payment thereof, then it shall be lawful for the said Company to sue for and recover the same, together with interest, at the rate aforesaid, up to the time of actual payment thereof, in any of his Majesty's courts of record, by action of debt, or on the case, or by bill, suit, or information; or the said directors may, and they are hereby authorized to declare the shares belonging to any person or corporation so refusing or neglecting to pay in manner hereinbefore mentioned to be forfeited, and to be sold, subject to the provisions of the said act: Provided nevertheless, That no advantage shall be taken of any forfeiture of any share in the said undertaking until notice in writing, under the hands of two directors, or under the hand of the clerk or secretary of the said Company, of such share having been declared by the directors forfeited shall have been given or sent by the post unto or delivered to some inmate of the last known usual place of abode of the owner of such share, nor until the declaration of forfeiture of the said directors shall have been confirmed either at a general or special general meeting of the said Company, such general or special general meeting being held after the expiration of three calendar months at the least from the day on which such notice of forfeiture shall have been given; and after such declaration of forfeiture shall have been confirmed, the Company have power to direct the directors to dispose of the shares so forfeited in the manner herein set forth."

Sect. 162. "That in any action to be brought by the said Company against any proprietor of any share in the said undertaking to recover any money due and payable to such Company for or by reason of any call made by virtue of the said act, it shall be sufficient for the said Company to declare and allege that the defendant, being a proprietor of a share in the said undertaking, is indebted to the said Company in a certain sum of money, being the same sum or thereabout as the calls unpaid shall amount to, for so many calls of such sums of money upon such share or so many shares belonging to the defendant, whereby an action has accrued to the said Company by virtue of the said act, without setting forth the special matter; and on the trial of such action it shall only be necessary to prove that the defendant at the time of making such respective calls was a proprietor of a share or shares in the said undertaking, as such action was brought in respect of or some one such share; and that such notice was given as was directed by the act of such calls having been made, without proving the appointment of the directors

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has been discharged by his death from a liability imposed on him by an act of Parliament, and his own conduct.

The testator, in his lifetime and at the time of his death, was the registered owner of certain shares, and in respect of them liable to contribute to calls. The share has remained ever since his death standing in his name as the registered owner. The question is, whether his estate is exempted from the liability which the statute has imposed on him as between himself and other adventurers, to pay his contribution to the common fund.

who made such respective calls, or any other matter or thing whatsoever: and the said Company shall thereupon be entitled to recover what shall appear due (including interest, computed as aforesaid) on such calls unless it shall appear that any such call exceeded £3 for every share, and was made within the distance of three calendar months from the last preceding call: and in order to prove that the defendant was a proprietor of such alleged shares, the production of the book in which the said Company is by the said act directed to enter and keep the names and additions of the several proprietors of shares in the said undertaking, with the number of shares they were respectively entitled to hold, and of the places of abode of the said several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof, or be entitled to shares therein, shall be *primâ facie* evidence that such defendant was a proprietor, and of the number and amount of his shares therein, provided that the name of the defendant in the record substantially agrees with that in such book; and in order to prove that such notice was given as herein aforesaid, the production of the newspaper shall be *primâ facie* evidence:"

Sect. 163. (See antè, p. 815, note.)

Sect. 164. "That all the shares in the said undertaking shall, to all intents and purposes, be deemed personal estate, and be transmissible as such."

Sect. 166. "That it shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators, and successors, to sell any share or shares to which they shall respectively be entitled therein, subject to the rules herein mentioned. And the conveyance of such share or shares shall be by writing, duly stamped, and may be in the following words" (here follows a form of conveyance). "And on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said Company, or by the clerk or secretary of such Company, who shall enter in some book, to be kept for that purpose, a memorial of such transfer and sale, and indorse the entry of such memorial

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The argument raised against it has been, in the main, this: that whereas the indulgence is given to the Company, of suing under circumstances with particular forms, which forms, it may be argued, are not applicable to the case of an executor, therefore an executor cannot be sued at all. There is no substance in the argument. Supposing that the clause containing the indulgence had been altogether out of the act of Parliament, the executors, as well as the persons whom they represent, would have been equally liable to be sued: it does not follow that they cannot be sued, because the indulgence given to the Company does not extend to the case of executors. I am of opinion that, as to the calls made before as well as to those made after the testator's death, the testator's estate is liable, with interest at five per cent., and the exceptions must be dealt with accordingly. Those parties who have excepted to the Master's report, for finding the calls, which were made in the lifetime of the testator, due with five per cent. interest, must have their exception overruled with taxed costs: the other exceptants will take back their deposit.

on the said deed of sale or transfer, &c. And, until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and such purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking."

Sect. 167. By which power was given to the Company to close books at certain periods, and notice of such intended close of books was to be given.

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ATTORNEY-GENERAL *v.* THE EASTERN COUNTIES RAILWAY COMPANY, AND THE NORTHERN AND EASTERN RAILWAY COMPANY.

An information was filed at the relation of one of the commissioners appointed under 12 Geo. 3 & 57 Geo. 3, against the Eastern Counties Railway Company and the Northern and Eastern Railway Company, for the purpose of restraining them by injunction, from constructing or making any covering or building over certain streets and courts within the jurisdiction of the said acts.

The defendants were desirous of building a station, and for that purpose proceeded, under the powers of their act, to arch over certain streets within the jurisdiction of the said Paving Commissioners: —*Held* by the Lord Chancellor, on appeal, that an injunction should issue to restrain the defendants from constructing or making any covering or building over the streets in question, further or otherwise than might be necessary for the purpose of constructing the *railway*, but at the same time directed a case for the opinion of the Barons of the Court of Exchequer, as to the right of the Company to cover in or build over such streets for the purposes of a *station*.

Their Lordships having certified that they were of opinion that the defendants were entitled (if it was necessary or reasonably convenient for the construction of a station and proper warehouses) to construct such coverings or buildings, by arches or otherwise, over the streets within the jurisdiction of the Paving Commissioners: —*Held*, that the injunction should be dissolved, the fact of the commencement of the works by the defendants being sufficient proof of the necessity for, and the convenience of such buildings.

INFORMATION, filed the 7th August, 1841, stated that the relator was one of the commissioners for carrying into execution an act of Parliament, (passed 12th Geo. 3), intituled, "An act for cleansing, paving, lighting, watching, and regulating the squares, streets, rows, lanes, alleys, public passages and places within the parish of Christchurch, in Middlesex, and for removing nuisances and obstructions therefrom, and preventing the like for the future, and for paving and regulating such streets;" and also another act, (passed 28th Geo. 3), made to explain and amend the former act, and by the said act (28th Geo. 3) further powers were given to the said commissioners for preventing the erecting, without leave as therein mentioned, of hoards in the said streets, and for removing obstructions therein; and also another act of Parliament, (passed 57th Geo. 3), intituled, "An act for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein," whereby it was provided that the provisions therein contained should extend to all streets &c. within the weekly bills of mortality; and it was amongst other things enacted, "that it should and might be lawful to and for the said commissioners and trustees, or other persons having the control of the pavements of the streets and public places in any parochial or other district

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within the jurisdiction of the said act, and for their surveyor and surveyors from time to time, and at all times thereafter, to regulate or remove in such manner as he or they should from time to time judge proper, all such projections and obstructions as therein mentioned from the fronts or sides of any house or houses or other buildings, and then affixed or belonging to any house or houses or other buildings in or abutting upon or contiguous to any streets or public places in any parochial or other district within the jurisdiction of the said act, or to the owner or owners, or occupier or occupiers of any such houses or other buildings, and which in the judgment of the said commissioners or trustees, or other persons as aforesaid, or of their surveyor or surveyors of pavements for the time being, then did or might obstruct the circulation of light and air, or were inconvenient and incommodious to any passengers along the carriage or footways of any of the said streets or public places of or within the jurisdiction of the said act, or any part thereof, or to any inhabitants of such parochial or other district." That the parish of Christchurch was within the bills of mortality. That among the streets and places subject to the powers of the commissioners under the said acts, was the south side of a street or place called Goddard's Rents, and the east side of a court called Bell-court; and that the said street called Goddard's Rents was in length about 124 feet, and ran east and west, and was terminated at the west end thereof by Cock Hill, which commenced at the west end of Goddard's Rents at right angles therewith, and ran to the north; and the said street called Goddard's Rents was terminated at the east end thereof by Wheeler-street, which ran north and south across the said east end of Goddard's Rents, and opposite the east end of Goddard's Rents on the east side and out of Wheeler-street, the said court called Bell-court ran in an easterly direction; and that the line of division between the said parish of Christchurch and the

parish of St. Matthew, Bethnal Green, ran along the centre of Goddard's Rents; and that the north side of such line was in the parish of St. Matthew aforesaid; and that the line of division between the said parishes of Christchurch and St. Matthew as to so much of Wheeler-street as was on the north side of the termination of Goddard's Rents was in the centre of Wheeler-street, and the west side of such line was in the parish of St. Matthew, and the east side thereof in the parish of Christchurch.

That an act of Parliament was passed (6 & 7 Will. 4, c. cvi.), intituled, "An act for making a railway from London to Norwich and Yarmouth, by Romford, Chelmsford, Colchester, and Ipswich, to be called 'The Eastern Counties Railway.'" And by the said act, certain persons were formed into a corporation, under the name of the Eastern Counties Railway Company, and that by that name they should sue and be sued; and they were formed into such corporation for making the said railway, and certain powers were thereby given for the purpose of making such railway, and for purchasing property for that purpose; and in the schedule to the said act was mentioned the property which, under the said act, might be purchased for the purpose of the said railway; and part of such property consisted of certain houses and yards in Goddard's Rents aforesaid. And that the said act was amended, and the powers thereby given enlarged, by another act, (passed 1 & 2 Vict. c. lxxxi.) intituled, "An act to amend and enlarge the powers and provisions of the act relating to the Eastern Counties Railway.

That another act of Parliament was passed (6 & 7 Will. 4, c. ciii.) intituled, "An act for making a railway to form a communication between London and Cambridge, with a view to its being extended hereafter to the Northern and Eastern Counties of England," and by which certain persons were incorporated under the name of 'The Northern and Eastern Railway Company,' and by that name they

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might sue and be sued. And powers were given to the said Company to make such railway, and to purchase certain property for that purpose, and which railway was to commence, under the said act, at a place in the said act mentioned, and situate in the parish of St. Mary Islington.

That another act of Parliament was passed (2 & 3 Vict. c. lxxviii.) intituled, "An act to enable the Northern and Eastern Railway Company to alter the line of their railway by forming a junction with the Eastern Counties Railway, and to provide a station and other works in Shoreditch, and to amend the act relating to the Northern and Eastern Railway." And under the said last-mentioned act, and the schedule thereto, the said Northern and Eastern Railway Company had power to take certain houses and yards situate in the parish of St. Matthew, and amongst others, certain other houses and yards situate at Cock Hill, Goddard's Rents, and Wheeler-street, aforesaid. And by the same act it was provided that nothing therein contained should extend to prejudice, derogate, or diminish any of the rights and privileges of any parish over which the said railway should pass, under and by virtue of the said act (57 Geo. 3), or of any local act or acts of Parliament, but that the same should be in as full force and effect as if the said then stating act had not been made.

That the line of railway was partly on the sites of houses on the south side of Goddard's Rents, and parallel therewith and across Wheeler-street, and the said respective Companies, under the powers given to them, purchased and pulled down the houses on each side of Goddard's Rents, and the houses on Cock Hill, and the houses on each side of Wheeler-street, to the south of Goddard's Rents, at its junction with Wheeler-street; and that the said respective Companies had also purchased and pulled down some of the houses in Bell-court, but that Goddard's Rents,

Cock Hill, and Wheeler-street continued to be and were public thoroughfares for passengers, with a carriage-way along the whole length thereof for carriages and carts, and Bell-court continued a public thoroughfare for passengers.

That the said Eastern Counties Railway, and said Northern and Eastern Railway, used the same terminus in Shoreditch, and for a certain distance from such terminus they used the same railway for their respective carriages, and said Eastern Counties Railway had not any power under these acts to take or use any property to the north of the centre line in Goddard's Rents, nor on the west side of such part of Wheeler-street aforesaid, nor any part of Cock Hill, nor any part of Bell-court; and that said Northern and Eastern Railway Company had not any power, under the said acts, to take and use any property to the south of the centre line in Goddard's Rents, nor to the East of the centre line of such part of Wheeler-street aforesaid. And then follow statements that the Company intended to cover over some of the said streets, and that the public way would be very much prejudiced and injured; and that the commissioners sent a letter to the said Company, to the effect that they would not permit any covering over the said streets, nor any extension of the archways or works of the Company, by which the free circulation of light or air in any of the streets, or courts, or places under their jurisdiction might be impeded, or in any manner encroached upon or obstructed.

And the bill prayed, that the said defendants, the Eastern Counties Railway Company, and the Northern and Eastern Railway Company, and each of them, their respective agents, servants, and workmen, might be restrained by the order and injunction of the Court from constructing or erecting, or making or causing to be constructed or erected or made, any covering or building over the way or

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passage through Goddard's Rents, or over the way or passage through Cock Hill, or over Wheeler-street, and Bell-court aforesaid, and from doing any act whereby, or by means whereof, the free admission of the light and air in and to the said streets or passages might be obstructed or hindered (*a*).

(*a*) The sections in the several acts of Parliament referred to were as follows:—

(6th & 7th Will. 4, c. ciii.)

Sect. 10. "That the said Company, in making the said railway and other works by the said act authorized, shall have full power to deviate from the line delineated on their plans: provided always, that no such deviation shall extend to a greater distance than 10 yards in towns, nor to a greater distance than 100 yards in other places, from the line so delineated on the plans."

Sect. 31, which after giving the Company the power of entering upon lands, enacts, "That for the purpose, and subject to the provisions and restrictions of this act, it shall be lawful for the said Company, their agents and workmen, and all other persons by them authorized, to make or construct upon, across, under or over the said railway or other works, or any lands, streets, hills, valleys, roads, railroads, or tram-roads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as the said Company shall think proper, and to divert or alter the course of any roads or ways, or to raise or sink any roads or ways in order the more conveniently to carry the same over or under or by the side of the said railway, and also in or upon the said railway or any lands adjoining or near thereto, to erect and make such toll and other houses, warehouses, yards, stations, engines, and other works and conveniences connected with the said railway as the said Company shall think proper, and also from time to time to alter, repair, &c., and generally to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the said railway and other works by the said act authorized, they the said Company, &c., doing as little damage as may be, &c., and making satisfaction, &c."

Sect. 104. "That the said railway shall not be made across any street or highway upon which carts or carriages shall pass on the level without the previous consent in writing of some two justices of the peace for the county or place within which the street or highway so to be crossed shall be situate, and when the said railway shall cross any public footpath in any other manner than on the level, the said Company shall make and maintain convenient ascents and descents, as the case may be, to such footpath."

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Motion was made (August 10, 1841) for a special injunction, according to the prayer of the bill.

The said amended act of the Northern and Eastern Railway Company (2 & 3 Vict. c. lxxvii.) contains the following recital:—"Whereas it would be greatly beneficial to the Northern and Eastern Railway Company, and also of advantage to the public, that the Northern and Eastern Railway should be provided with a station, yard, warehouses, and other conveniences, near to the London depot or terminus of the said Eastern Counties Railway."

Sect. 5 enacts, "That it shall be lawful for the said Northern and Eastern Railway Company, and they are hereby empowered, to provide a station, depot, and yard, and to erect warehouses and such other buildings, works, and conveniences, with all necessary approaches, as they shall think proper for the purposes of their said railway undertaking, and to construct a railway from such station to join the said Eastern Counties Railway in the respective parishes, townships, and extra-parochial places of Saint Matthew, Bethnal Green, Christ Church, Spitalfields, and Saint Leonard, Shoreditch."

Sect. 6. "That it shall be lawful for the said Northern and Eastern Railway, and they are hereby empowered for the purposes aforesaid, to take the lands and buildings described in the schedule to the said act. And all the clauses, powers, provisions, directions, regulations, liabilities, and restrictions contained in the Northern and Eastern Railway Act, and in any act passed for extension of the same act, relating to the compulsory purchase of land for making the said Northern and Eastern Railway shall extend and apply to the purchase of land and buildings for the railway hereby authorized to be made, and for the station, depot, yard, warehouses, works, buildings, conveniences, and approaches hereby authorized to be made and provided as fully to all intents and purposes as if such clauses, powers, provisions, directions, regulations, and restrictions were therein repeated and re-enacted with respect to the land and buildings hereby authorized to be taken as aforesaid."

Sect. 58. "That nothing in this act contained shall extend to alter, diminish, or take away, or in any manner to prejudice the rights, privileges, powers, and authorities, or any of them, vested in the Eastern Counties Railway Company by virtue of all or any of the acts relating to the last-mentioned railway, but that all such rights, privileges, franchises, powers, and authorities shall be in full force in like manner as if this act had not been passed."

Sect. 67. "That in crossing all roads, streets, public roads, courts, and alleys in the said parishes respectively, for the purposes of making the said railway hereby authorized to be made, the said

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Affidavits were filed by the plaintiffs in support of the bill, and by the defendants in opposition thereto, whereby it was sworn, that Goddard's Rents and Cock Hill were not thoroughfares for carts and carriages, but were so only for foot passengers, and that the points to which they led could be approached by a way through other existing streets equally short, or not exceeding a further distance

railway shall be so formed, and for ever continue, as to leave a clear and open space for such streets, roads, public ways, courts, and alleys, and that all the arches underneath the last-mentioned railway shall span across the whole width of such roads, streets, public ways, courts, and alleys, including the foot-paths thereof respectively, and that the forms of the said arches shall be either semi-ellipses or segments of arches, and that none of the said arches shall be less than 16 feet clear in height, and that the present levels of the said roads, streets, and public ways shall not in any manner be altered or interfered with, unless in cases where the commissioners of paving or trustees holding jurisdiction over such streets, &c., shall consent in writing that the said archway shall be of less dimensions, or that the levels of any such roads, &c., shall be altered."

Sect. 73. "That nothing in this act contained shall extend to prejudice, derogate, or diminish any of the privileges of any parish over which the said railway shall pass, under and by virtue of the said act of the 57th Geo. 3, or of any local act or acts of Parliament, but that the same shall be in as full force and effect as if this act had not been passed."

Sect. 75. "That it shall be lawful for the said Northern and Eastern Railway Company, and they are hereby required to sell, transfer, and relinquish to the said Eastern Counties Railway Company, and that it shall be lawful for the said last-mentioned Company to take and purchase from the said Northern and Eastern Railway Company the site of the station, depot, yard, warehouses, and approaches thereinbefore authorized to be provided by the said Northern and Eastern Railway Company, and of the railway from such site to the said Eastern Counties Railway, or the benefit of any contract for a right to the same or in regard thereto or any part thereof, and so that the same may henceforth form a part of the property of the said Eastern Counties Railway Company, and that it shall be lawful for the said Eastern Counties Railway Company to enlarge their present station, and to erect all necessary warehouses, buildings, works, and conveniences, and to make such connecting railway as aforesaid, on the premises so hereby authorized to be purchased."

of three yards, and that the defendants had purchased and pulled down all the houses in Goddard's Rents and Cock Hill.

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THE VICE-CHANCELLOR.—I am of opinion that, in the absence of any evidence shewing that the Companies (defendants) are disregarding any of the special provisions of their acts as to the height and general construction of their works, they are authorized, in their present proceedings, for completing their railway and other works. I cannot, therefore, grant the injunction prayed for.

The plaintiffs renewed their motion by way of appeal.

THE LORD-CHANCELLOR.—I am of opinion that an injunction should issue to restrain the defendants, the Eastern Counties Railway Company and the Northern and Eastern Railway Company, their agents, servants, and workmen, from constructing or making any covering or building over the way or passage through Goddard's Rents, or over the way or passage through Cock Hill, or over Wheeler-street, or over the way or passage through Bell-court, in the information and bill mentioned, further or otherwise than might be necessary for the purpose of constructing a railway from the station of the Northern and Eastern Railway Company to the Eastern Counties Railway Company, in pursuance of the power given by an act passed in 2 & 3 Vict.; but, at the same time, I must direct, that a case be drawn up for the opinion of a Court of law, whether the defendants, the Eastern Counties Railway Company, and the defendants the Northern and Eastern Railway Company, both or either of them, are entitled to construct or make any covering or building over the way or passage through Goddard's Rents, or over the way or passage through Cock Hill, or over Wheeler-

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street, or over the way or passage through Bell-court, *further or otherwise* than may be necessary for the purposes of constructing a railway from the station of the Northern and Eastern Railway to the Eastern Counties Railway, in pursuance of the powers contained in the act of 2 & 3 Vict.

A case having been accordingly sent for the opinion of the Court of Exchequer, came on for argument in *Hilary* Term, before Lord *Abinger*, C. B., *Parke*, *Alderson*, and *Gurney*, Bs.

Sir *F. Pollock*, Attorney-general, for the plaintiff.

Sir *W. Follett*, Solicitor-general, for the defendants.

Their Lordships returned the following certificate to the Court of Chancery:—

We are of opinion that the Northern and Eastern Railway Company were entitled, if it was necessary or reasonably convenient for the construction of a station and proper warehouses, to construct and make coverings or buildings by arches or otherwise over the public streets mentioned in the said case, in like manner as they were entitled to do for the construction of the railway itself; and that by their last act of Parliament they were expressly authorized to construct such station and warehouses at or near High-street, Shoreditch.

When the above certificate was returned to the Court of Chancery, the defendants had put in their answer to the said

information and bill, whereby they said, that the acts complained of by the said information had been carried on and done by defendants, the Eastern Counties Railway Company, with the authority, and, to a great extent, for the benefit of defendants, the Northern and Eastern Railway Company, and, under such circumstances, defendants had joined in one defence.

That the places in the said information referred to were within the limits within which the works authorized by the several Eastern Counties Railway Acts were by those acts authorized to be carried on and executed, subject only to the provisions and regulations thereof. And that the same places were also within the limits within which the works authorized by the several Northern and Eastern Railway Acts were by those acts, subject as aforesaid, authorized to be carried on and executed.

That, prior to the passing of the said act (2 & 3 Vict.) respecting the Northern and Eastern Railway, the defendants, the Eastern Counties Railway Company, had completed their railway at and near the places in said information mentioned, though other works, authorized by the Eastern Counties Railway Acts to be done, still remained to be carried into effect at and near those places; and that said Eastern Counties Railway as so made, had been and was carried and made on a viaduct twenty feet above the level of the streets and places which it crossed, and the same had been and was carried across Wheeler-street by means of an archway, and that it had consequently become and was necessary that all works connected with such railway should be made at the same or the like level.

That all the works executed at the places in said information mentioned, had been works which were strictly and clearly works authorized to be executed by the said acts; and that, for the purpose of executing such

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works, authority had been given by said acts for covering over the places which had been sought to be covered over.

That, so far as such works related to the construction of a railway, there was not any question whatever as to their right to cover over such places for the purposes of the said works. And, in fact, with a very small exception, the whole of the works for the purposes of which they then sought to cover over such places, consisted of a railway from the Northern and Eastern Railway station to join the Eastern Counties Railway.

That the convenience and advantage to the railway of covering in said streets and places in the manner proposed was extremely great, and that no inconvenience whatever was thereby occasioned to the public; and that, with respect to Bell-court, in said information mentioned, the only covering intended to be made over any part of the same was an archway, and that the entrance to Bell-court was theretofore by an archway under a house which had been pulled down, under the provisions of the said acts; and that, in fact, Bell-court would still be as light and as little incommoded as the same was previously to the commencement of the said railway arches.

With respect to Goddard's Rents and Cock Hill, which appeared to be the principal subject of the complaints therein contained, that there had never been any thoroughfare for carriages or carts through those places, and that any such thoroughfare was precluded by posts at one end of Cock Hill; and that, under the provisions of said acts, the whole of the houses in Goddard's Rents, and, with the exception of three houses, the whole of the houses in Cock Hill, had been purchased and pulled down, and that of such three last-mentioned houses two had the entrance in another street, called Anchor-street; and although the entrance to the third was in Cock Hill, yet that it was within five yards of

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Anchor-street, and several yards above that part of Cock Hill which was intended to be covered over, and that there is a more convenient and shorter thoroughfare for foot passengers through Anchor-street and Wheeler-street to the end of Goddard's Rents than through Cock Hill and Goddard's Rents, and that, by the effect of the said acts, any thoroughfare through the last-mentioned way had become wholly useless; however, that such thoroughfare would be still open to the public.

That no nuisance whatever could be occasioned by covering over Goddard's Rents and Cock Hill in the manner proposed; and that, in fact, the same would be more likely to be a resort of idle and dissolute characters, and, in that manner, a nuisance, if the same should be covered to a less extent than was proposed, than the same would be if covered to the full extent proposed by them.

That if any inconvenience of the kind suggested in said information should arise, the proper remedy for the same would be, to stop up the way through Cock Hill and Goddard's Rents, which could be done without any inconvenience to the public whatsoever.

March 17, 1842.

A motion on the Barons' certificate was made, for the purpose of dissolving the injunction.

Mr. *Bethell* and Mr. *L. Wigram*, for the motion.

Mr. *Coe*, contrà.

THE LORD CHANCELLOR.—The only point I have to decide is, whether it is reasonably convenient for the construction of a station and proper warehouses, that the defendants should make coverings or buildings, by arches or otherwise, over the public streets mentioned in the case.

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The first view shews that it is reasonably convenient, or the Company would not have already laid out vast sums upon the present erections. And, if the opinion of the Court of Exchequer is right, the question is now decided. The Company have a right to erect their station anywhere within the limits prescribed by their acts; and, if a street intervene, they have power to arch over such street in the manner pointed out by the same acts. I must, therefore, dissolve the injunction.

His Lordship directed that the costs of the motion, and of the proceedings at law, should be costs in the cause.

COURT OF EXCHEQUER.

In Michaelmas Term, 1841.

FENTON *v.* THE TRENT AND MERSEY NAVIGATION COMPANY.

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By a Canal Act (1 Will. 4, c. lv,) a Company were empowered to take lands for the purpose of their navigation, with provision for a jury to ascertain the sums to be paid as purchase-money and for damage in carrying the act into effect. By sect. 170, it was provided that no mine-owner should work any mine in or under any lands within 40 yards of certain tunnels (by which the canal passed under a hill), without the leave of the Company; and by sect. 171, if the Company, instead of insisting upon having the full 40 yards left unworked, should require less than 30 yards to be left, then the mine-owner might insist on having a greater quantity, not exceeding 30 yards, left unworked for his security; and the question in dispute as to such last-mentioned quantity was to be tried, settled, and determined by an issue at law.

Sect. 172 provided, that whenever any mine in due course should become workable within 40 yards of the tunnels, the mine-owner should give notice to the Company, who thereupon should pay him, (as the case might be), for so much of the 40 yards as they should require to be left unworked for their security, or as might be ascertained by the issue to be necessary to be left unworked for his. Provided that no mines should in any case be worked under the tunnels; but whenever any such last-mentioned mines should become workable, satisfaction should be made by the Company for the same, such satisfaction to be settled by an issue at law.

Sect. 178 gave the mode of trying any feigned issue, and enacted, that, after trial and verdict, the Court should give judgment for the sum of money awarded by the jury.

Held, that, where a mine had become workable within 40 yards of the tunnels, and the Company had required the whole 40 yards to be left unworked for their security, the owner of the mine was entitled (under sect. 172) to compensation for the 40 yards, but that the only remedy to enforce it was by a feigned issue, and not by an action on the case.

CASE.—The declaration stated, that before the committing of the grievances by the defendants thereinafter mentioned, by a certain act (1 Will. 4, c. lv, (*a*)), amongst other powers and provisions therein contained, relating to certain mines and minerals in the said act mentioned, power was given to the said Company to require the owners and workers of any mine or mines, mineral or minerals, in or under any lands within the distance of forty yards from certain tunnels through Harecastle Hill, or either of them, in the said act mentioned, to leave the said last-mentioned mines and

(*a*) Intituled, "An Act to consolidate and extend the Powers and Provisions of the several Acts relating to the Navigation from the Trent to the Mersey."

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minerals unworked and ungotten as aforesaid, and the owners and workers of the said mines and minerals, and all other persons whosoever, were by the said act prohibited from working or getting any of the said mines and minerals, so required by the said Company to be left unworked and ungotten as aforesaid; and it was by the said act (amongst other things) further enacted, that when and as often as any mines or minerals lying under the said tunnels through Harecastle Hill, or either of them, or in or under any lands within the space or distance of forty yards from the same respectively, should become workable in the due and regular course of working and getting the same, notice thereof in writing should be given by the owner or worker of such mines or minerals to the said Company thereby established, and thereupon the said Company should pay to the owners or workers of such mines or minerals respectively, in proportion to their respective interest therein, for all or so much of the said mines or minerals so becoming workable, and contained in or under the lands within the said space or distance of forty yards, as should be required by the said Company to be left ungotten or unworked, for the security or preservation of the said tunnels and works, or any of them, or (as the case might be) for so much of the said mines or minerals so becoming workable as should be ascertained and determined, in pursuance of the provision thereinbefore contained, to be necessary to be left unworked or ungotten for the security and preservation of the mines: and whereas also, after the passing of the said act of Parliament, and before the giving of the notice by the plaintiff as hereinafter mentioned, and before the committing of the grievances by the defendants as hereinafter mentioned, and from thence hitherto, the defendants have been and still are the owners of certain tunnels over and near adjoining to certain mines, minerals, and strata of coal and ironstone hereinafter moreparticularly mentioned and described, of the said plaintiff, made, cut, and driven

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through a certain hill called Harecastle Hill, situate, lying, and being in the township or hamlet of Ravenscroft, otherwise Ranscliffe, in the parish of Woolstanton, in the county of Stafford: and whereas also, after the passing of the said act of Parliament, and before the giving of the notice by the plaintiff as hereinafter mentioned, and before the committing of the said grievances by the defendants as hereinafter mentioned, and from thence hitherto, the plaintiff hath been and still is the owner of certain mines and minerals hereinafter more particularly mentioned and described, lying in and under certain lands in the township or hamlet of Ravenscroft, &c., lately in the occupation of Robert Williamson, Esq., within the space or distance of forty yards from the said tunnels through Harecastle Hill in the said act mentioned, and which said last-mentioned mines and minerals, and each and every of them, had, before the giving of the said notice by the plaintiff, and before the committing of the said grievances hereinafter mentioned, become and were workable in the due and regular course of working and getting the same: and whereas also after the said last-mentioned mines and minerals, and each and every of them, had so become and were workable as last aforesaid, and before the committing of the said grievances as hereinafter mentioned, to wit, on the 25th May, 1840, the plaintiff, as the owner of the said last-mentioned mines and minerals, and each and every of them, did, in pursuance of the provision in that behalf in the said act contained, give notice in writing to the said Company, to the effect following (that is to say), that certain mines or strata of ironstone lying in or under certain lands in the township or hamlet of Ravenscroft, then or lately in the occupation of Robert Williamson, Esq., within the space or distance of forty yards from the tunnels through Harecastle Hill in the said act mentioned, and which mines and strata of ironstone lie respectively between the two mines of coals respectively called Spendcroft coal and

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Ten-feet coal, and between the two mines of coal respectively called Ten-feet coal and Great-row coal, and between the two mines of coal respectively called Great-row coal and Little-row coal, had respectively become and were workable in the due and regular course of working and getting the said last-mentioned mines or strata of ironstone respectively, and also that the said several mines of coal respectively called or known by the name of Ten-feet coal, Great-row coal, and Little-row coal, lying in and under certain lands in the township or liberty of Ravenscroft aforesaid, then or lately in the occupation of the said Robert Williamson, within the space or distance of forty yards respectively from the said tunnels respectively, had become and were workable in the due and regular course of working and getting the said mines of coals respectively; and the plaintiff did, by the said notice, require the said Company to make satisfaction for and pay to the plaintiff, as the owner of the said last-mentioned mines or minerals respectively, for his interest in all such parts of the said last-mentioned mines or minerals lying in or under the aforesaid lands, within the space of forty yards from the said tunnels respectively, as should be required by the said Company to be left ungotten or unworked for the security or preservation of their said tunnels and works, or any of them; and in case the said Company should consent that any part of the said last-mentioned mines and minerals lying in or under any of the said lands, within the space of forty yards, should be worked or gotten, then the plaintiff did, by the said notice, require the said Company forthwith to declare and give such consent in writing under their common seal in manner mentioned in the said act, and by such consent to specify and set forth how much and what part or parts of the said last-mentioned mines and minerals, lying in or under any of the said lands within the space or distance aforesaid, they required to be left ungotten or unworked, for the security or preservation of

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their said tunnels and works, or any of them; and the plaintiff did, by the said notice, further require the same Company to make satisfaction and payment to the plaintiff, as the owner of the said last-mentioned mines respectively, for his interest in all the said last-mentioned mines and minerals lying in or under the said lands, within the space or distance aforesaid, or as the case might be, for all such parts, if not the whole, of the said last-mentioned mines and minerals as should be required by the said Company to be left ungotten or unworked as aforesaid; and for that purpose the said plaintiff did, by the said notice, further require the said Company to ascertain and determine how much of the said last-mentioned mines and minerals were required by the said Company to be left ungotten or unworked as aforesaid, and to proceed forthwith to a valuation or valuations of the said last-mentioned mines or minerals, or of such parts thereof as should be required by the said Company to be left ungotten or unworked as aforesaid, and of the plaintiff's interest therein: and the plaintiff did then, by the said notice in writing, further give notice to the said Company, that he the plaintiff was ready and willing to concur, and the plaintiff did then offer to concur with the said Company in all proper and reasonable steps for or towards such valuation or valuations; and the plaintiff in fact saith, that although afterwards, and after the giving of the said notice in writing, and before the committing of the said grievances, to wit, on the 14th July, 1840, the said Company did require the plaintiff to leave unworked and ungotten, for the security and preservation of the tunnels and works in and through Harecastle Hill aforesaid, the whole of the mines, minerals, and strata of coal and ironstone, respecting which such notice was given by the plaintiff to the said Company as aforesaid; and although the plaintiff did, in pursuance of such requirement by the said Company, leave unworked and ungotten, for the security and preservation of the said tunnels and works

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in and through Harecastle Hill aforesaid, the whole and every part of the said last-mentioned mines, minerals, and strata of coal and ironstone, so required by the said Company to be left unworked and ungotten as aforesaid; and although the whole and every part of the said last-mentioned mines, minerals, and strata of coal and ironstone have been, from the time when the plaintiff was so required by the said Company as aforesaid, hitherto left unworked and ungotten, and still are unworked and ungotten, of which the said Company have always had notice; and although it thereupon became and was the duty of the said Company to pay to the plaintiff, as the owner of such last-mentioned mines, minerals, and strata of coal and ironstone, for his, the plaintiff's, interest therein, the price and value of all the said mines and minerals, strata of coal and ironstone so required as aforesaid by the said Company to be left ungotten and unworked, for the security and preservation of the said tunnels and works in and through Harecastle Hill aforesaid: nevertheless the plaintiff in fact saith, that the said Company have not, although often requested so to do, as yet paid to the plaintiff, as the owner of such last-mentioned mines, minerals, and strata of coal and ironstone, for his interest therein, the price and value of such last-mentioned mines, minerals, and strata of coal and ironstone, or any of them, or any part thereof, although a reasonable time for making such payment had long elapsed before the commencement of this suit, but have hitherto altogether neglected and refused, and still do neglect and refuse so to do; by means of which said several premises the plaintiff hath been, and is greatly injured and hindered and prevented from working and getting his said mines and minerals, as he otherwise might and would have done, and the plaintiff hath also, by means of the said premises, altogether lost and been deprived of the price and value of the same, &c.

Plea, that the plaintiff commenced his said action

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against the defendants in the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, in the county of Middlesex, after the making of the said act of Parliament in the said declaration mentioned; and that the said mines and minerals in the said declaration alleged to have become workable in the due and regular course of working and getting the same, were, at the said times in the said declaration in that behalf mentioned, and still are lying under the said tunnels in the said declaration also mentioned, or one of them, or in or under the lands within the space or distance of forty yards from the same tunnels respectively; yet the plaintiff hath not delivered or tendered to the defendants any declaration in any action upon a feigned issue commenced in any of her Majesty's Courts of Record at Westminster, in which the said plaintiff is plaintiff, and the said Company are defendants, in respect of the said mines and minerals, or any of them, or in respect of payment or satisfaction for the same.—Verification.

Special demurrer, assigning for causes:—That the plea does not sufficiently traverse, or confess and avoid the causes of action in the declaration mentioned; that the plaintiff, by his declaration, seeks to recover damages against the defendants for a breach of duty as therein alleged, in respect only of the mines, minerals, and strata of coal and ironstone belonging to the plaintiff, and lying respectively in and under the lands within the space or distance of forty yards from the said tunnels, in the said declaration mentioned, whereas the defendants have, in and by their plea, attempted to raise a defence in respect of other mines and minerals than those embraced by the plaintiff's declaration, viz. in respect of mines and minerals lying under the tunnels in the declaration mentioned, or one of them; and also for that the defendants, in and by their said plea, have attempted to raise a defence on the omission by the plaintiff to deliver or tender to the

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defendants any declaration in any action upon a feigned issue: but the defendants do not, in their said plea, aver that the said mines and minerals in the declaration mentioned, lie under the said tunnels through Harecastle Hill, or either of them, or in or under the lands within the space between the same tunnels; nor does the said plea contain any averment to shew that the provisions of the said act of Parliament, in the declaration mentioned, relating to feigned issues, are applicable to the mines and minerals in the said declaration mentioned, or any of them; and for that the said plea is pleaded to the whole of the declaration, and ought to contain averments to shew that the whole of the mines and minerals in the declaration mentioned, are subject to the provisions of the said act of Parliament relating to the feigned issues; and also for that, in and by the said act of Parliament in the declaration above-mentioned, the method of trial by feigned issues is expressly confined and limited to such mines and minerals, and strata of coal and ironstone, as shall respectively lie under the said tunnels through Harecastle Hill, or either of them, or in or under the lands within the space between the same tunnels, whereas the claim of the plaintiff is only in respect of the mines and minerals, and strata of coal and ironstone, lying in orunder the space or distance of forty yards from the external side of the said tunnels, or either of them, the whole of which said last-mentioned mines and minerals have been required by the defendants to be left ungotten and unworked by the plaintiff as aforesaid, and does not include any demand in respect of the mines and minerals lying under the said tunnels, or in or under the space between the same.

Creswell, in support of the demurrer (*a*).

(*a*) Nov. 10, before Lord *Abinger*, C. B., *Parke*, *Gurney*, and *Rolfe*, Bs. The points relied upon in argument, and sections of the act, are sufficiently set out in the judgment.

R. V. Richards (*W. I. Alexander* with him), contrà.

Cur. adv. vult.

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ROLFE, B., now delivered the judgment of the Court.—The question in this case is, whether the plaintiff can recover, in an action on the case, the value of mines which he has left ungotten for the convenience of the defendants, pursuant to the provisions of the local act (1 Will. 4, c. lv,) under which the Company is incorporated, or whether he is not bound to assert his right by means of a feigned issue. The act is certainly somewhat obscure, but upon an attentive consideration of the different sections bearing on this case, we have come to the conclusion that the defendants are right in saying that the only remedy open to the plaintiff is that of a feigned issue.

The Company is empowered in the ordinary way to take lands for the purposes of the navigation; and by the 118th and several subsequent sections, provision is made for ascertaining, by a sheriff's jury, the sum to be paid by the Company, as well for land taken, as for any damage occasioned by the Company in carrying the provisions of the act into effect. But this is not all. The navigation, it seems, traverses a mining district, and in that district passes through two tunnels under Harecastle Hill. In order to protect the Company from injury by the working any mines too near to those tunnels, the act contains the following provisions:—first, by section 170, it provides, "that no owner or worker of any mine or mines, mineral or minerals, nor any other person whomsoever, shall open, dig, sink, or carry on any work for the discovering or getting of any mine or mines, mineral or minerals, in or under any lands within the distance of forty yards from the said tunnels through Harecastle Hill, or either of them; nor shall any mine or mines, mineral or minerals, be worked or got under such tunnels, or in or under any lands within such distance from the same respectively

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as aforesaid, without the consent of the said Company." Secondly, section 171, for the security of the mine-owners, enacts, "that in case the said Company hereby established shall at any time or times hereafter require any less quantity of the said mines and minerals than is contained in or under the lands lying within the space or distance of thirty yards from the western side of the said tunnel, made through Harecastle Hill, by virtue of the first hereinbefore recited act, or within the space or distance of thirty yards from the eastern side of the said additional tunnel, to be left unworked or ungotten for the security and preservation of the said tunnels and works, or any of them, but nevertheless, the owner or worker of the said mines or minerals shall deem it necessary that all the mines or minerals within the last-mentioned respective spaces or distances of thirty yards should be left unworked and ungotten for the security and preservation of the said mines, then and in every such case the question or dispute as to the quantity of such mines or minerals necessary to be left for the last-mentioned purpose (such quantity not exceeding the whole of the mines and minerals contained within the said respective spaces or distances of thirty yards) shall be tried, settled, and determined by an issue at law."

Then follows the 172nd section, on which the question mainly turns: It is thereby provided, "that whenever any mine becomes workable in the ordinary course, under or within forty yards of the tunnels, the mine-owners or workers shall give notice to the Company, and thereupon the Company shall pay to the owners or workers of such mines or minerals respectively, in proportion to their respective interests therein, for all or so much of the said mines or minerals so becoming workable, and contained in or under the lands within the said space or distance of forty yards as shall be required by the said Company to be left ungotten or unworked for the security or preservation of the said tunnels and works,

or any of them, or (as the case may be) for so much of the said mines and minerals so becoming workable, as shall be ascertained and determined, in pursuance of the provision hereinbefore contained, to be necessary to be left unworked or ungotten for the security and preservation of the said mines; provided nevertheless, that the mines and minerals lying under the said tunnels through Harecastle Hill, or either of them, or in or under the lands within the space between the same tunnels, shall in no case be worked or gotten by any person whomsoever, but when and as often as the last-mentioned mines or minerals, or any of them, shall from time to time become workable in the due and regular course of working and getting of the same, satisfaction shall be made by the said Company for the said last-mentioned mines and minerals to the owner or worker thereof, such satisfaction to be ascertained, fixed, and determined by an issue at law."

The five following sections provide for working the mines within the forty yards, not required by the Company to be left unworked, and for compensating the mine-owners for the injury to their mines arising from the works of the navigation, and (*a*) for working mines in and under the land adjoining the other part of the line, exclusive of the two tunnels. Section 178 then points out the course to be taken for trying any feigned issue under the act; after the trial and verdict in which the Court is to give judgment for the sum of money awarded by the jury.

There is no doubt but that by the express terms of the 172nd section, the plaintiff is entitled to be paid for the value of the forty yards of mine left unworked for the security of the navigation. The only question is, by what proceeding he is to enforce his right.

Now it is to be observed, that the clauses from 170 to 180, both inclusive, all relate to this question of working mines

(*a*) Sect. 177.

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in the immediate neighbourhood of the navigation, and providing compensation to the mine-owners for the mines of which they are deprived by the Company; and these clauses must all be construed together, and with reference to one another, as all forming part of a general system of legislation. It is admitted that the amount to be paid for the mines *under* the tunnels is, by the express terms of the 172nd section, to be settled by an issue. So again by the positive words of the 177th, the amount of mines to be left unworked at any part of the line of the navigation, other than within forty yards of the tunnels, and also *the sum to be paid by way of compensation for what is so left unworked*, is to be settled by an issue. It seems, therefore, impossible to believe the legislature could have meant to adopt so strange a course, as to provide a specific mode of ascertaining the compensation to be paid for the mines left unworked under the whole line of the canal, and adjoining the whole line, except for the space of forty yards from the two tunnels; and to have left the compensation for those forty yards to be settled by an ordinary action on the case. No one can assign any reason why the mode of ascertaining the value of a mine within the forty yards and any other mine left unworked should be different. We feel bound, if possible, to put such a construction on the 172nd section as shall prevent a consequence which it is quite obvious the legislature could never have contemplated; and we think this can be done without offering material violence to the language of the 172nd section.

That section may be considered as divided into three branches, by every one of which the Company is made liable to pay money to the mine-owner, by way of satisfaction for the mine of which he is deprived. First, the Company shall pay the mine-owner for the mine within the forty yards, where the forty yards are taken. Secondly, the Company shall pay him for the mine, not exceeding thirty yards, left unworked for his security. Thirdly, as

to the mine actually under the tunnel—no person shall be at liberty to work it; but when workable, satisfaction shall be made for it by the Company to the mine-owners; then follow these words, "such satisfaction to be ascertained, fixed, and determined by an issue at law."

It may be conceded, that the more obvious construction of this clause "such satisfaction," &c. only applies to the satisfaction immediately preceding, namely, the satisfaction to be paid at all events for the mines left unworked under the tunnels. There is, however, nothing grammatically incorrect, in referring the words, "such satisfaction," to every species of satisfaction mentioned in the clause, namely, the payments to be made for the mine within the forty yards, for mines within thirty yards, and for the mines actually under the tunnels; and in furtherance of what we cannot but suppose, from the whole tenor of these eleven clauses, must have been intended by the legislature, and to avoid the strange incongruity of having one mode of deciding questions as to the value of mines within forty yards of the tunnels, and another as to the value of mines along the rest of the line of canal, and under the tunnels themselves, we feel bound to adopt the latter construction of the words "such satisfaction," and to hold them applicable to every case for which satisfaction is made payable under the 172nd section.

The necessity of such a construction will be made more obvious by considering that, unless it is adopted, there must, when the mine-owner has got within forty yards of the tunnel, and is then stopped by the Company, be two proceedings going on at the same time, in order to ascertain the compensation to which he is entitled; for it is obvious, when the mine-owner has got up to within forty yards of the tunnel, the mines under the tunnel must have become *workable*, inasmuch as the Company, by preventing the mine-owners from working within forty yards, may effectually prevent the mines under the tun-

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nels from being ever workable, unless they be deemed so when the mine-owner has reached the confines of the forty yards. The forty yards therefore having become workable, and the mines under the tunnel at the same time workable, the plaintiff must contend that the legislature intended to impose on him the necessity of instituting two proceedings, one to recover by action compensation for the mine within forty yards of the tunnel, and another to recover by an issue compensation for that under the tunnel. Exactly the same anomaly would occur whenever the mine-owners, in the progress of working, approach within forty yards of the tunnel, and also within such a distance of the adjoining parts of the canal as, either by the agreement of the parties, or the result of an issue, is ascertained to be the distance within which the mines cannot be worked with safety to the canal. In such a case, the value of the mine to be left unworked for security of such part of the canal as does not pass through the tunnel, is by express provision (the 177th section) to be tried by an issue. It is impossible to suppose the value of that part left for the security of the tunnels could be intended to be tried by a different tribunal. The legislature seems to have considered the tunnels to have been more exposed to danger from the mines than the rest of the line of this canal. This afforded a very good reason for not leaving it to the jury to say, how much mine should be left for the protection of the tunnels, but to fix a width of forty yards as necessary, in case the Company should choose to insist on it; but we can conceive no reason why the value of this part of the mine should be intended to be ascertained by a different proceeding from that applicable to the rest.

Our view of the case is confirmed by considering the 178th section, which seems to have supposed that in every case where an issue is to be tried a sum of money will have to be awarded by the jury. That section expressly refers, among other issues, to issues to be tried under the 171st

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section, for ascertaining how much mine it may be necessary to leave for the security of the mine-owners. It is clear, if in such an issue nothing was to be ascertained but the quantity to be left unworked, no sum of money would be awarded at all; and it would seem as if the legislature assumed that on the trial of such an issue the jury would be bound under other provisions of the act to assess the value of what was left; and there are no provisions applicable to such a case, unless they can, as we think they may, be found in the 172nd section.

On all these grounds, we think that this case is within the 172nd section, and consequently there must be judgment for the defendants.

Judgment for the defendants.

COURT OF COMMON PLEAS.

In Michaelmas Term, 1841.

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Nov. 19.

ALDRIDGE *v.* THE GREAT WESTERN RAILWAY COMPANY.

In an action on the case against a Railway Company, the declaration stated, that the defendants, by their servants, so carelessly, negligently, and improperly managed their steam-engine, and the fire therein contained, that through such negligence &c. divers sparks and portions of the said fire passed from the steam-engine of the defendants, to, into, and upon a certain rick of beans of the plaintiff, standing in a field near the said railway, which by means thereof became ignited, burnt, and consumed. Plea, not guilty.

CASE.—The declaration stated that the plaintiff, on &c., was lawfully possessed of a certain rick or stack of beans, containing &c., of the value &c., then standing in a certain field or parcel of land of the plaintiff, situate &c., and near to a certain railway, then used by the defendants, for the purpose of driving and propelling, from time to time, in and along the same, certain steam-carriages and engines containing fire and igneous matter, to wit, at &c., and the defendants were also then, to wit, &c., possessed of a certain steam-carriage and engine containing fire and igneous matter, which was then driven and propelled in and along the said railway, near to the said rick or stack of the plaintiff, and was then under the care and management of certain persons, then servants and agents of the defendants, who were then regulating and directing the same; yet the defendants, by their said servants and agents, then and there *so carelessly, negligently, and improperly* managed and directed the said steam-carriage and engine and the

In a special case, stated for the opinion of the Court under a Judge's order, (by 3 & 4 W. 4, c. 42, s. 25), it was stated, that the plaintiff had erected the rick about eleven yards from the rails of the railway; that the engines and boiler used upon this railway were such as are usually employed on railways, and were used, at the time of setting fire to the rick, in the ordinary manner, and for the purposes authorized by the act.

Held, that upon this statement, there was evidence for the jury on the question of negligence in the defendants, and that they were not entitled to a nonsuit, and consequently, that the case was improperly stated for the opinion of the Court under the statute.

said fire and igneous matter therein then contained as aforesaid, that by and through *the carelessness, negligence, and improper conduct* of the defendants, by their said servants and agents in that behalf, divers sparks of fire and divers portions of the said fire and igneous matter then and there passed and flew from and out of the said steam-carriage and engine of the defendants to, into, and upon the said rick or stack of the plaintiff, and by means thereof the said rick or stack of the plaintiff, being of the value aforesaid, then and there became ignited, and was thereupon and by means of the said premises then and there wholly burnt, consumed, and destroyed, and by means thereof the plaintiff hath wholly lost and been deprived of the use and benefit of the said rick or stack of beans, and was injured &c., to the damage &c. Plea, not guilty; on which issue was joined.

The following case was stated for the opinion of this Court, under a Judge's order, pursuant to the statute 3 & 4 Will. 4, c. 42, s. 25:—

The defendants are a Company duly incorporated, by the name of the Great Western Railway Company, under and by virtue of an act of Parliament, (5 & 6 Will. 4, c. cvii). The railway which the defendants have made under the provisions of this act extends along the extremity of, and immediately adjoining to a field of the plaintiff, situate in the parish of Burnham, in the county of Buckingham, and at the south-eastern extremity of this field the plaintiff had erected the stack of beans mentioned in the declaration, at a distance of about eleven yards from the rails on which the railway carriages and engines of the Company run, which said stack was placed close adjoining the boundary or fence rails of the said railway. The stack contained about forty quarters of beans, and was ignited by means of certain sparks of fire which were emitted from one of the engines of the defendants, which passed along the railway near the spot above mentioned, at

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about half-past five o'clock in the afternoon of Tuesday the 16th of April, 1839, and the whole was in consequence consumed, with some of the fence rails adjoining. The engines and boilers used for the said railway *are such as are usually employed on railways*, for the purpose of propelling the trains and carriages thereon, and the engine from which the sparks flew, which set fire to the stack in question, was used at that time in the ordinary manner, and for the purposes authorized by the said act of Parliament. By the 189th section of that act above referred to, the said Company are empowered to regulate the passage on the railway, and manage and direct the use thereof. By the sects. 190 and 191, the carriages and engines used on the said railway, are placed under the entire direction, control, and approval of the said Company; and by s. 192, the boilers of all the engines used on the said railway are required to be so constructed as to consume their own smoke.

The question for the opinion of the Court is, whether, under the circumstances above set forth, this action can be maintained, and whether the defendants are liable to make compensation to the plaintiff for the loss sustained by him in consequence of the said consumption of the said stack of beans; and if the Court shall be of opinion that the defendants are so liable, then the defendants agree that judgment herein shall be entered against them by confession for the sum of 62*l.* 8*s.* as damages herein, immediately after the decision of this case, or otherwise, as to the Court shall seem meet, and that judgment be entered accordingly; but if the Court should be of a contrary opinion, then the plaintiff agreed that judgment as in case of a nonsuit shall be entered against him. And it is agreed that this case may, at the request of either party, be turned into a special verdict, and the record made up and the verdict of a jury taken for that purpose, if necessary.

The points stated for the plaintiff were, that there is no-

thing in the act of Parliament incorporating the Company to exonerate them from their liability to indemnify the plaintiff for the injury to his property caused by their engine; that the defendants are liable on the general principle that each person must so use his own property as not to injure that of another, and that the facts of the case disclose positive negligence on the part of the defendants.

For the defendants—That the action is not maintainable without some wrongful act or omission by the defendants; that the case discloses neither negligence, nor improper conduct on the part of the defendants, and that that cannot be regarded as a nuisance or wrongful act, which is authorized by act of Parliament: that the defendants are not answerable for unavoidable accidents, and that it does not appear that it was necessary or even convenient to the occupation of the plaintiff's field, that the stack should have been placed so near the railway, or within reach of the sparks from the engines (*a*).

(*a*) The material sections of the statute (5 & 6 Will. 4, c. cvii), are as follows:—

Sect. 167 enacts, "That it shall be lawful for the said Company, if they shall think proper, to use and employ locomotive engines or other moving power upon the said railway," &c.

Sect. 189. "That it shall be lawful for the said Company from time to time to make such orders and regulations as they shall think proper, for regulating the travelling upon and use of the said railway, and the times when the same shall be open for use, and for or relating to travellers and carriages passing upon the said railway, and for or relating to the mode or means by which, and the speed at which such carriages shall from time to time be moved or propelled, and the times of their departure and arrival, and the loading or unloading thereof respectively, and the weights which they shall respectively carry, and the delivery of goods and other things which shall be conveyed in or upon such carriages, and also for preventing the smoking of tobacco and the commission of any other nuisance in or upon any such carriages, or in any of the stations or premises occupied by or belonging to the said Company, and generally for regulating the passing upon, using, or working the said railway and other works by this act authorized, or in anywise relating thereto respectively; and all such orders and regulations shall be binding upon and be conformed to by the said Com-

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Channell, Serjt. (*Blair* with him), for the plaintiff (*a*).—This case stands upon the defendants' liability at common law.

pany, and by all owners of and persons having the care or conduct of such carriages, and by all persons using or working the said railway and other works, and by all travellers and passengers passing upon the said railway, upon pain of forfeiting and paying a sum not exceeding 5*l.*, which the said Company may attach to any such default: Provided always, that in every case of infraction or non-observance of any such rules or regulations, which shall be attended with danger to the public or annoyance to travellers, or which shall obstruct or hinder the said Company in their due and lawful use and working of the said railway, it shall be lawful for the said Company and their agents summarily to interfere to obviate such danger, or to remove or prevent such obstruction, nuisance, or hindrance."

Sect. 190. "That no carriage shall pass along or be upon the said railway or any part thereof, or the works connected therewith, (except in directly crossing the same, as herein authorized, for the occupation of the respective lands through which such railway shall be laid, or in passing any public or private carriage road which may happen to cross the said railway), unless such carriage shall have been originally constructed according to the rules and regulations which the said Company may from time to time make in regard to carriages, (and which rules and regulations the said Company are hereby expressly authorized to make, and wholly or partially alter or revoke from time to time, with power to make new rules and regulations from time to time in lieu of or in addition to any former rules and regulations), nor unless such carriage shall at all times, so long as it shall be used or shall be on the said railway and works, or any part thereof, remain and be of such construction, and in such state and condition as the rules and regulations of the said Company may, from time to time, or at any time require: Provided always, that all the rules and regulations which the said Company may from time to time make in regard to such carriages, shall, before they have any effect as rules and regulations, be published once in some one newspaper of every county through which the said railway shall pass, and such publications as aforesaid shall be deemed and taken to be sufficient for all purposes, and to be express notices of such rules and regulations to all persons and Companies whomsoever, and the production of a newspaper of each of the said counties, containing a notice purporting to be a notice of the rules and regulations of the said Company, shall, for all purposes, be considered sufficient evidence of the due making and publication of such rules and regulations; provided also, that if

(*a*) Before *Tindal*, C. J., *Coltman* and *Maule*, Js.

They are *primâ facie* liable upon the principle that every person must so enjoy his own property as not to injure that

any dispute shall at any time and from time to time arise between the said Company and the owner of any such carriage, as to the original construction, or as to the state or condition from time to time or at any time of any such carriage, in reference to the then past or existing rules and regulations of the said Company, such disputes shall from time to time, when and as they may arise, be immediately referred to three indifferent persons, one to be appointed by the said Company, and another by the owner of any such carriage, and the third to be appointed by the two so first appointed previous to their entering on the business of the reference, and the decision in writing of such two arbitrators and their umpire, or of any two of them, (as the case may be), shall be final and conclusive; and if either the said Company or the said owner shall, for ten days after being so required in writing by the other of them, neglect or refuse to appoint a referee to act on their or his behalf, then the referee of the other party may alone make a final decision in writing, and such award or decision shall, upon proof of the signatures thereto, be admitted in all Courts and before all judges, justices, and others, as sufficient evidence for all purposes whatsoever of all the facts therein stated; and if any carriage, not originally constructed according to the then rules and regulations of the said Company, or not from time to time or at any time being in the state and condition which the rules and regulations of the said Company in existence at that time may require, shall pass or be in or upon any part of the said railway, or the works connected therewith (except as aforesaid), the owner thereof, or his servant, or any one of his servants, having for the time being the charge of any such carriage, shall forfeit and pay any sum not exceeding 10*l.* nor less than 5*l.* for every such offence."

Sect. 191. "And whereas for the greater security of passengers and other persons travelling upon and using the said railway, it is expedient that the moving powers to be from time to time used in drawing or propelling carriages upon or along the said railway should be under the control of the said Company; be it therefore enacted, that no locomotive or other engine, or other description of moving power, shall at any time be brought upon or used on the said railway, unless the same shall first have been approved of by the said Company; and it shall be lawful for the said Company, and they are hereby required within fourteen days after notice given to them by any person desirous of bringing any such engine on the said railway, to cause their engineer or other agent to inspect and examine such engine at any place within five miles of the said railway, and to report thereon to the said Company, who shall within seven days after such report,

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of another. It is for the defendants to shew that they are within either of the exceptions to this rule. 1. Where the injury has been caused more or less by the act of the plaintiff himself. 2. Where it arose from unavoidable accident. The first case does not of course arise in this instance, therefore the defendants will seek to bring themselves within the second. To do that, however, the injury must be, it would seem, such a one as no conceivable degree of precaution or forethought could have avoided. It must amount in fact to the act of God.

If the injury be immediate, trespass is the right form of action against the person causing it. [*Tindal*, C. J.—Acci-

in case such engine shall be found fit and proper to be used on the said railway, give a certificate to the party requiring the same, of their approval of every such engine; and it shall be lawful for the said Company, from time to time upon the report of their engineer or other agent, of any engine used upon the said railway being out of repair or unfit to be used upon the said railway, to order the same to be taken off, or to forbid the same to be used upon the said railway; and in case any person shall bring or use upon the said railway any locomotive or other engine, or any other moving power, without having first obtained such certificate of approval as aforesaid; or in case, after notice given by the said Company to remove from, or not to use upon the said railway any such engine as aforesaid, the person to whom such engine shall belong shall not forthwith remove the same, or shall use any such engine upon the said railway without having first repaired the same to the satisfaction of the said Company, and obtained such certificate of approval as aforesaid, every such person shall forfeit and pay any sum not exceeding 20*l.* for every such offence, and the said Company are hereby authorized to remove such engine from the said railway."

Sect. 192. "That the boiler of every locomotive steam-engine to be used upon the said railway shall be constructed upon the principle of consuming its own smoke, under a penalty of 5*l.* for every offence, to be recovered in a summary way by the order and adjudication of one or more justice or justices of the peace, on complaint to him or them for that purpose made, in the same manner as other penalties and forfeitures (for the recovery whereof no special directions are given) are by this act directed to be recovered, one half of which sum, as often as the same shall be recovered, shall be paid to the informer, and the other half to the vestry-clerk or other proper officer of the parish or place where such offence shall be committed, for the benefit of the poor of such parish or place."

dent could not be answer in trespass. By unavoidable accident must be meant inevitable necessity.] Yes, but the defendant must shew it: *Weaver* v. *Ward* (*a*). In *Lambert* v. *Bessey* (*b*), Sir *T. Raymond* says, "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering;" and cites a case, Mich. 6 Edw. 4, f. a. pl. 18. [*Tindal*, C. J.—This was much the subject of discussion in *Leame* v. *Bray* (*c*).] In an anonymous case, in Trin. 28 Car. 2 (*d*), the Court said, "It was the defendant's fault to bring a wild horse into such a place, where mischief might *probably* be done by reason of the concourse of people." So, in *Underwood* v. *Hewson* (*e*), where the defendant was uncocking a gun, and the plaintiff standing close to it, it went off and wounded him; at the trial it was held the plaintiff might maintain trespass: and in *Turberville* v. *Stampe* (*f*), a man was held answerable for the damage done by a fire in his field, the sparks of which set on fire the grass in his neighbour's field. In *Wakeman* v. *Robinson* (*g*), *Dallas*, C. J., said, "The doctrine, as applicable to actions of this description, is, that no man can be excused of a trespass, unless he can justify that the act complained of was entirely without his fault, and if that justification be proved, it is an answer to the trespass;" and see *Davis* v. *Saunders* (*h*). [*Tindal*, C. J. —There was a case of *Dickinson* v. *Watson*, Easter, 34 Car. 2 (*i*). I have a note as to the report in Jones, that the Court there said, that there would be no excuse but matter of unavoidable necessity.]

It seems clear that the act of the servants of the Company, who were in charge of the engine, though unintentional, was a trespass: *Weaver* v. *Ward* (*a*); *Scott* v.

(*a*) Hob. 134.
(*b*) Sir T. Raym. 422.
(*c*) 3 East, 593.
(*d*) 1 Ventris, 295.
(*e*) 1 Stra. 596.
(*f*) 1 Salk. 13; 1 Ld. Raym. 264; Comb. 459.
(*g*) 8 Moore, 63; 1 Bing. 213.
(*h*) 2 Ch. 639.
(*i*) Sir T. Jones, 205.

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Shepherd (*a*). In *Leame* v. *Bray* (*b*), which was an action in trespass for driving against the plaintiff's curricle, Lord *Ellenborough*, C. J., says, "I do not find that distinction laid down in the cases, that, in order to maintain trespass, it must be wilful." The case of *Underwood* v. *Hewson* (*c*) is in principle very similar to the present.

If the present action, therefore, were against the servants, it would be in trespass; being against their employers, it must be in case. As against a servant nothing could excuse the trespass but his shewing an impossibility of avoiding it. Therefore, as the act complained of is the same, and the nature of the injury inflicted the same, the same rule will still apply, although the forms of pleading require that the action against the master should be in case. The principle on which the master is liable at all, is that the act of the servant is substantially his: *Middleton* v. *Fowler* (*d*). And so identified are they that the declaration may be frequently against the master, without noticing the servant at all. *Brucker* v. *Fromont* (*e*); and from the report of *Turberville* v. *Stampe*, in 1 Lord Raymond (*f*), it appears that the fire in the field was kindled by the defendant's servants. The law however will not make a man a trespasser by relation, and therefore, though the servant in the ordinary course of his employment does that which would amount to a trespass in him, the action against the master should be in case: *Morley* v. *Gainsford* (*g*); *Dixon* v. *Bell* (*h*). On the other hand, the master is not liable for the wilful act of the servant, done without the direction or assent of the master: *M'Manus* v. *Crickett* (*i*). The allegation of negligence then in an action on the case against the master for an unintentional tres-

(*a*) 3 Wils. 403.
(*b*) 3 East, 594.
(*c*) 1 Stra. 596.
(*d*) 1 Salk. 282.
(*e*) 6 T. R. 659.
(*f*) Page 264.
(*g*) 2 H. Bl. 442.
(*h*) 5 M. & S. 198.
(*i*) 1 East, 105.

pass by his servant seems to be introduced to distinguish it on the one hand from a trespass which the master has authorized, and on the other from a trespass by the servant wilfully and without authority, for which the master is not liable at all. In *Christie* v. *Griggs* (*a*), Sir *J. Mansfield*, C. J., said, "I think the plaintiff has made a *primâ facie* case by proving his going on the coach, the accident, and the damage he has suffered. When the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied: he has always means to rebut this presumption if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident." [*Tindal*, C. J.—In running down cases, the question in practice is never whether it was a case of inevitable necessity, but negligence in the servant. The common rule is, "you must recover *secundum allegata et probata*." Here you allege negligence.] There was negligence; that is, there was the absence of such caution as would be observed by persons of ordinary prudence. The Company are empowered to use locomotive engines, but nothing is said as to any particular construction; and the statement in the case that they were made and conducted in the usual manner does not exempt them from these consequences.

Bompas, Serjt., contrà.—In *Christie* v. *Griggs* (*a*), there was a contract to carry safely, which makes a wide distinction between that case and the present. This is an ordinary engine, and if there be any defect in it, it ought to have been stated by the plaintiff in the case. [*Tindal*, C. J.—The declaration does not complain of the engine being improper, but of the careless management of it. *Maule*, J.—And the defence is, not that the defendants are not careless, but that they conduct themselves in the

(*a*) 2 Camp. 79.

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ordinary manner.] Who then is to prove the negligence? the Court will not infer it. If this is an ordinary engine, used in the ordinary manner; if no negligence on the part of the defendants is proved, they are not liable. In *Rex* v. *Pease* (*a*), which was an indictment against a railway Company for a nuisance, in consequence of their locomotive engines having frightened the horses of persons using a neighbouring highway, it was held that the interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified. That is, when a Company are merely pursuing a course authorized by act of Parliament, they are only liable if negligent. The commissioners under paving acts are not responsible for injuries to individuals. Here there is no evidence of carelessness in using more engines than usual, or of notice of the probability of firing the stack. The common rule of law is, that the affirmative of such an issue is upon the plaintiff.—[Here he was stopped by the Court.]

TINDAL, C. J.—I cannot help thinking that upon the statement in this case we cannot come to any conclusion. The defendants contend that the plaintiff at a trial ought to be nonsuited. I think not. I am not prepared to say, that the fact of sparks of fire or igneous matter escaping from the engine, though one in ordinary use, might not have been, in the opinion of the jury, an element of negligence. I do not think we can be called upon here to give an opinion under the act, and the case ought to go to a jury in the ordinary course.

COLTMAN, J.—I also think this is a case for a jury.

(*a*) 4 B. & Ad. 30.

When it comes to trial the defendants might be able to satisfy the jury that they took every precaution.

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MAULE, J.—The only question of law raised here is, whether upon this statement of evidence the plaintiff ought to be nonsuited. I think clearly not; because, if the case went to the jury, there is evidence on which they might find negligence in the defendants.

The case to be withdrawn, with liberty to the plaintiff to proceed to trial.

COURT OF QUEEN'S BENCH.

In Hilary Term, 1841.

THE BIRMINGHAM, BRISTOL, AND THAMES JUNCTION RAILWAY COMPANY *v.* WHITE.

Feb. 1.

IN this case *Platt* had obtained a rule *nisi*, calling upon the plaintiffs to shew cause why the defendant and his attorney should not be at liberty to inspect and take extracts from the minute books of the plaintiffs, particularly as regarded the minutes of the meetings at which the several calls, in respect of which the action was brought, were made.

He moved upon an affidavit of the defendant's attorney, who stated his belief, that in order to plead the several

By a Railway Act (6 W. 4, c. lxxxvii, s. 108), it was provided that it should be competent to inspect all books, &c. relating to the Company, at any general or special meeting, which general meetings (by sect. 98) are to be held every six months. An application having been made to the Court, on the part of a defendant, against whom an action for calls had been commenced, and who had not availed himself of the privilege, to order an inspection of the minute book of the directors, to enable him to ascertain whether there were a competent body present to make the call in question, the Court refused to make the order.

Semble, that taking out a summons before a Judge at Chambers is sufficient demand of inspection from the directors.

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grounds of defence accurately, it was material and necessary that the defendant and his attorney should be allowed to inspect and take extracts from the minute books of the plaintiffs, and particularly as regarded the minutes of the aforesaid meetings, and of the several meetings at which certain deviations or alterations in the formation of the railroad in question were resolved upon: that with a view to instructions for the requisite pleas for the defence of this action, he had applied by summons for the above purpose, which summons was heard by a Judge at Chambers, who suggested that application should be made to the full Court: that, to the best of his belief, the information required was necessary to the defence, and only to be procured from the said books: that there was a good defence upon the merits, and that the application was made *bonâ fide* for the above purpose, and no other whatever.

Sir *J. Campbell*, Attorney-General, and *James*, shewed cause and took a preliminary objection that it did not appear clearly that there had been any demand and refusal of inspection. [Lord *Denman*, C. J.—Taking out the summons, coupled with the other circumstances stated in the affidavits, amount to a demand; but that objection does not appear to have been taken at Chambers.]

This is an application on the part of a shareholder to inspect books, which he has had ample opportunity, under section 108, at proper and stated times, (that is, by section 98, at least once in every six months, at the general meetings), of inspecting. There is no such special power given by the statute, and he admits it is for the purpose of enabling him to plead pleas which, according to the decision in *The South Eastern Railway Co.* v. *Hebblewhite* (*a*), are inadmissible. If he is not a proprietor he cannot avail himself

(*a*) Antè, p. 247.

of section 108; and even if he is, he would not be entitled to an inspection now, but would be treated as a stranger. *Burrell* v. *Nicholson* (*a*). They also cited *Hodges* v. *Atkis* (*b*).

Platt, contrà.—Although section 108 gives the right of inspecting the books at a general or special meeting, that might not assist an individual shareholder, who might be outvoted in his demand for such a proposition. The defendant might have taken issue on every preliminary step to recovering for calls, had it not been for the short form of declaration given by the statute, but by which he is put in no worse situation. [*Patteson*, J.—There are many cases where an inspection is granted before pleading, as in the case of a written agreement, of which the only part in existence is in the hands of the opposite party. The defendant may demand an inspection to enable him to plead a particular plea; here he wishes to find out some *possible* defence.]—He wishes to ascertain whether there was a sufficient number of competent directors present to make the calls, to see that they were *properly* made, as the plaintiffs have only to prove that they were *in fact* made; and that purpose ought to entitle him to this inspection: *King* v. *King* (*c*).

Lord DENMAN, C. J.—In *King* v. *King* (*c*), the plaintiff seeking the inspection had a clear and direct property in the deed. The only doubt here is, whether these books are not partnership property, to which all the shareholders might have access. But I think it could not have been the intention of the legislature to give so large and inconvenient a power of inspection as that contended for on the part of the defendant. The object for giving an inspection of documents, is not to enable a defendant to fish out a defence

(*a*) 3 B. & Ad. 649. (*b*) 3 Wils. 398; 2 W. Bl. 877.
(*c*) 4 Taunt. 666.

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from some defect in the proceedings, but, if he has a defence, to assist him to ascertain how he may be able properly to plead it.

LITTLEDALE, J., concurred.

PATTESON, J.—I am of the same opinion. The defendant has neglected all the means of obtaining information given to the shareholders by the statute, and ought not to be assisted, as soon as a call is made, in his search for a defence against it.

COLERIDGE, J., concurred.

Rule discharged (*a*).

(*a*) See *Rex* v. *Antrobus*, 2 A. & E. 788.

The following cases were omitted as a note to *The London Grand Junction Railway Co.* v. *Freeman*, antè, p. 505, on the authority of which they were determined :—

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In Hilary Term, 1841.

THE BIRMINGHAM, BRISTOL, AND THAMES JUNCTION RAILWAY COMPANY *v.* LOCKE. *Jan.* 13.

DEBT for calls on forty shares in the above Company. Plea—1. *Nunquàm indebitatus*—2. Defendant not a proprietor—3. That after defendant became a proprietor, and the calls were made, and defendant had so become indebted, &c., the directors of the Company had declared the shares to be forfeited. Replication taking issue on the two first pleas, and *de injuriâ* to the third, on which issue was joined.

At the trial before *Coleridge*, J., at the sittings at Guildhall, after Michaelmas Term, 1838, it appeared that the defendant was not one of the original proprietors, but had purchased the shares, and received scrip certificates from original proprietors, who, however, had not been registered; which certificates, in August, 1836, he had sent in to the Company with a claim to be registered, and had been

By a Railway Act (6 & 7 Will. 4, c. lxxix, s. 130) it was enacted, that if any owner or proprietor for the time being of a share should neglect or refuse to pay the calls thereon, the Company might sue for and recover the same, or the directors might declare his shares to be forfeited and order them to be sold. Provided that no advantage should be taken of such forfeiture, until notice to the owner that such share hath been declared forfeit, nor until such declaration of forfeiture, shall have been confirmed at a general or special general meeting of the Company.

In an action for calls, it was proved that the Company gave notice to the defendant, that if the calls were not paid by a certain day, the shares would be declared forfeited. The calls were not paid, and the defendant afterwards tendered his vote at a meeting of proprietors, when it was rejected; but the forfeiture was never confirmed by a meeting of the Company.

Held, that the defendant could not avail himself of this state of facts as a defence to the action, on the ground of not being a proprietor, as the forfeiture does not attach till sanctioned by a meeting of proprietors.

Held also, that the holders of scrip certificates were properly entered before the passing of the act as proprietors, though they had neither signed the parliamentary contract nor been original subscribers.

And that the register book, though irregularly kept in not containing the amount of the subscriptions paid on the shares (sect. 125), was *primâ facie* evidence that the defendant was a proprietor.

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registered accordingly. The register-book was produced, but did not contain the amount of subscriptions paid on the shares, as required by section 125. After the calls were made, a notice was sent to the defendant, dated November 4th, 1836, to inform him, that, in the event of his not paying the calls on or before a certain day, his shares would be declared to be forfeited (*a*).

The defendant did not pay the calls, but the forfeiture was not confirmed at any meeting of proprietors. He attended a meeting on the 8th of March, 1837, and tendered his vote, but the chairman would not receive it. The jury found a verdict for the plaintiffs. Leave being given to the defendant, Sir *W. Follett*, in Hilary Term, 1839, obtained a rule *nisi* for a nonsuit or a new trial (*b*), and in the Trinity Term following—

Sir *J. Campbell*, Attorney-General, and *Shee*, Serjt., shewed cause (*c*), and contended that no forfeiture of the shares had taken place, as the provisions of sect. 130 had not been complied with. As to the objection to the register-book, they cited *The Southampton Dock Co.* v. *Richards* (*d*).

(*a*) The sections of the act (6 & 7 Will. 4, c. lxxix) relied upon in the argument were nearly identical with those of the act (6 & 7 Will. 4, c. civ) set out in *The London Grand Junction Railway Co.* v. *Freeman*, antè, p. 468.

(*b*) Sect. 130 (empowering the directors to make calls, and directing the mode of making and paying them) enacts "that if any owner or proprietor for the time being of any share shall neglect or refuse to pay his rateable proportion of the monies to be called for, the Company may sue for and recover the same, &c., or the said directors may declare the shares belonging to such owner to be forfeited, and order the shares to be sold: provided nevertheless, that no advantage shall be taken of any forfeiture of any share in the said undertaking until notice shall have been given to the owner that such share hath been declared forfeited, nor until a declaration of forfeiture of the said directors shall have been confirmed, either at a general or special general meeting of the said Company, to be held after the expiration of three months from the day of notice.

(*c*) June 9, 1840, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.

(*d*) Antè, p. 215.

Sir *W. Follett*, *Hoggins*, and *Locke*, contrà, contended that the defendant was not proved to have become a proprietor by either of the three modes necessary for that purpose; viz.—1. By signing the parliamentary contract—2. By taking shares issued by the Company after the passing of the act, or—3. By purchase from a registered proprietor, under sect. 135. That the register-book, not having been made up according to sect. 125, was not admissible in evidence: *The Cheltenham Railway Co.* v. *Price* (*a*). And that the transfer of scrip before the passing of the act was illegal: *Josephs* v. *Pebrer* (*b*); *Duvergier* v. *Fellows* (*c*); *Blundell* v. *Winsor* (*d*); *Vice* v. *Lady Anson* (*e*); and *The Stratford and Moreton Railway Co.* v. *Stratton* (*f*).

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—Some objections to the plaintiffs' right to recover in this case arose from the mode of keeping the register-book. They have been considered and disposed of in the Exchequer Chamber, in the case of *The London Grand Junction Railway Co.* v. *Freeman* (*g*), where it was held that such book was *primâ facie* evidence, though kept irregularly; and that the holders of scrip certificates were properly entered, before the passing of the act, as proprietors in the undertaking, though they had neither signed the parliamentary contract, nor been originally subscribers.

It was also objected, that the Company had precluded themselves from treating the defendant as a proprietor, by declaring (through their directors) his shares forfeited for non-payment of former calls. But the forfeiture does not attach till it has been reported to, and sanctioned by a general meeting of proprietors. And the Court of Exche-

(*a*) 9 C. & P. 55.
(*b*) 3 B. & C. 639.
(*c*) 5 Bing. 248; 10 B. & C. 826.
(*d*) 8 Sim. 601.
(*e*) 7 B. & C. 409.
(*f*) 2 B. & Ad. 518.
(*g*) Antè, p. 468.

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quer has held, that notice of forfeiture does not excuse from payment of calls: *The Edinburgh, Leith, and Newhaven Railway Co.* v. *Hebblewhite* (*a*). This rule, therefore, must be discharged.

Rule discharged.

(*a*) Antè, p. 237.

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In Hilary Term, 1841.

THE LONDON GRAND JUNCTION RAILWAY COMPANY *v.* GRAHAM.

THE SAME *v.* GUNSTONE.

Jan. 13.

Before the passing of a Railway Act (6 & 7 W. 4, c. civ,) the defendants became possessed of scrip certificates of shares, (which had belonged to original subscribers), they did not, however, sign the parliamentary contract. After the act passed, in pursuance of notice by the Company, the defendants sent in the certificates, with a claim to be registered, and they were registered accordingly. No memorial of sale to either was entered, but one paid a call on his shares, and the other attended a meeting of the Company. The register-book was correct in the particulars required by the statute (s. 145) as to the defendants, but did not contain the names of all the original subscribers, and contained the names of some who were not so.

Held, that the defendants were liable as proprietors of shares, and that the register-book was *primâ facie* evidence against them.

DEBT for calls. Plea (in each action)—1. *Nunquàm indebitatus*—2. Defendant not a proprietor. At the trial before Lord *Denman*, C. J., at the sittings at Guildhall after *Michaelmas* Term, 1839, it appeared that the defendants had not been original subscribers for the shares in question, for which other persons had signed the parliamentary contract: that after the passing of their act (6 & 7 Will. 4, c. civ) (*b*), in pursuance of a notice by the Company, the defendant sent in scrip certificates for the said shares, with a claim to be registered for them; and that they were registered accordingly. It did not appear how

(*b*) Antè, p. 469.

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they became possessed of the scrip. The defendant in the first action had paid the first call on the shares, and in the second had attended a half-yearly general meeting of proprietors. The register-book was produced at the trial, and gave the requisite particulars as to the defendants, according to sect. 145 (*a*), but was objected to on the ground that it did not contain the names of all the original subscribers, and did contain names of some holders of scrip certificates who were not original subscribers. The jury, in both actions, found a verdict for the plaintiffs, leave being given to the defendants to move for a nonsuit; and in *Hilary* Term, 1840, *Byles* for Graham, and *Thesiger* for Gunston, having obtained rules *nisi* accordingly,—

Sir *F. Pollock* and *Swann* shewed cause (*b*).—As to the legality of transfer of scrip, and effect of the public act 6 Geo. 1, c. 18, ss. 18 & 19 (*c*), they cited *Fox* v. *Clifton* (*d*); *Josephs* v. *Pebrer* (*e*); *Rex* v. *Webb* (*f*); *Pratt* v. *Hutchinson* (*g*); *Kempson* v. *Saunders* (*h*); and *Duvergier* v. *Fellows* (*i*), where it is admitted that the defendants intended to act as a corporate body without a charter. The defendants, by their own acts, have admitted their liability.

Thesiger and *Byles*, contrà, contended that the defendants were neither proprietors nor subscribers within the meaning of the act; *The Thames Tunnel Company* v. *Sheldon* (*k*): and that the traffic in scrip before the passing of the act was invalid, according to *Josephs* v. *Pebrer* (*e*): whereas in *Fox* v. *Clifton* (*d*), the defendants were original holders of the scrip: that the admissions, by paying calls and claiming to be registered, were not sufficient to operate as an

(*a*) Antè, p. 470.
(*b*) June 9th, 1840, before Lord *Denman*, C. J., *Littledale*, *Patteson*, and *Coleridge*, Js.
(*c*) Repealed by 6 Geo. 4, c. 91.
(*d*) 6 Bing. 776, and 9 Bing. 115.
(*e*) 3 B. & C. 639.
(*f*) 14 East, 406.
(*g*) 15 East, 511.
(*h*) 4 Bing. 5; 12 Moore, 54.
(*i*) 5 Bing. 248; 10 B. & C. 826.
(*k*) 6 B. & C. 341.

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THE LONDON GRAND JUNCTION RAILWAY CO. v. GRAHAM.

estoppel by acquiescence; *Vice* v. *Lady Anson* (*a*): and that the register-book was inadmissible, as not giving the defendants the same advantages against other proprietors.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.—These cases were directed to be brought on for argument at the same time with *The Birmingham, Bristol, and Thames Junction Railway Co.* v. *Locke* (*b*), that all the objections might be argued together. Since that time the Court of Exchequer Chamber has decided, in the case of *The London Grand Junction Railway Co.* v. *Freeman* (*c*), that all the objections arising here are insufficient to prevent the plaintiffs from recovering. In both cases, therefore, the rules for new trials must be discharged.

Rules discharged.

(*a*) 7 B. & C. 409. (*b*) Antè, p. 917. (*c*) Antè, p. 468.

COURT OF CHANCERY.

1842.

Nov. 22.

GORDON *v.* CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY.

On appeal, where the question appeared to be one of law, the Court will require the decision of the legal question before the equities will be declared.

THIS cause came on for hearing on appeal from the judgment of his Lordship the Master of the Rolls (*a*).

Sir *W. Follett*, Solicitor-General, Mr. *G. Turner*, and Mr. *Wood*, for the appellants.

Mr. *S. Sharpe* and Mr. *L. Wigram*, for the respondents.

After a statement of the proceedings before the Master of the Rolls,

(*a*) Antè, p. 800.

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GORDON v. CHELTENHAM AND GREAT WESTERN UNION RAILWAY CO.

THE LORD CHANCELLOR.—There does not appear to me to be any controversy about those facts which are material for the purpose of raising the question at law, and I consider it a pure question of law. I think the true plan to be, first, to take the decision of a Court of law upon it, and then the equities will follow on the legal decision. If this is to go to the House of Lords, as I understand it is, I think it very important that the decision of a Court of law should be taken in the first instance; for if this be not done, it will be an appeal from the equitable jurisdiction of this Court to the equitable jurisdiction of the House of Lords; and when the question is opened there, and it shall appear to be a question of law, the Judges will be summoned, and they will have to decide that question, and by this course you will have only one legal decision.

Let the injunction be extended for the present, upon the same terms as granted by the Master of the Rolls.

COURT OF CHANCERY.

FYLER *v.* FYLER. *Nov.* 24.

A testator was a registered owner of certain shares in the Eastern Counties Railway Company, in respect of which three calls were made in his lifetime, and seven after his death, but nothing was paid.

In taking the account of his estate before the Master, the Company put in a claim for the amount of such calls, and interest, and the Master having allowed the claim as to the three calls made in the testator's lifetime, but disallowed it as to the seven calls made after his decease, exceptions were taken to the Master's report by the Company, as to the claim disallowed, and by the executors, as to the claim allowed:—*Held*, that the testator's estate was liable to pay, as well the calls made before, as those made after his decease, with interest at £5 per cent.

THIS was an appeal from the judgment of V. C. Sir *K. Bruce*, in a case argued on exceptions to the Master's Report (*a*).

Mr. *Bethell* (Mr. *Wigram* with him), opened the appeal.

Mr. *Koe*, Mr. *T. H. Hall*, and Mr. *W. H. Watson*, for the appellants.—The executors of the deceased testator are not proprietors within the meaning of the act, and unless they

(*a*) Antè, p. 813.

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do certain acts they cannot be so considered, and the estate of the testator is not liable to the calls in respect of shares. It is optional under the 157th section, on the part of the representatives of a person who has subscribed for shares, to go in and claim the benefit of those shares for the estate of the testator, or not so to do, if, in their opinion, such a course should not be considered beneficial, but until they go in and make a declaration they are not entitled to claim any benefit from those shares: and the act seems to provide for this case; for when persons in their representative character do not come in and claim the benefit of the shares, the Company may treat those shares as belonging to the Company, and receive the proceeds for their own benefit (sect. 160) (*a*). All the act provides for is this; that if the representative chooses to go in and claim, he may be entitled to the benefit of the shares, and if he do not, then the Company may declare the shares forfeited.

Every undertaking of this kind is commenced under the idea that it will be a profitable one, and the Company have provided that they shall in certain events become the owners of the shares, which is an equivalent to them for their value. The Company cannot compel any other agreement than that which they have entered into with the proprietors, and having made a particular provision with respect to executors and proprietors, the general remedy does not apply. There is a great difference between those who are, properly speaking, proprietors, and those upon whom shares have devolved, but who have not come in and made themselves proprietors, and the shares are as to the latter persons in abeyance. The act prescribes that the names of all proprietors should be registered, and the 156th section (*b*) points out in what manner this is to be done. The 6th section contains an express proviso for compelling proprietors to pay calls, but nothing is said about executors. The act of Parliament clearly prescribes that the executors of subscribers shall be liable, and uses that term; but there

(*a*) Antè, p. 819. (*b*) Antè, p. 818.

is a great difference between the proprietor and the subscriber, as a person may be a proprietor without subscribing the parliamentary contract.

THE LORD CHANCELLOR.—The shares are vested expressly by the act of Parliament in the several parties taking the same, and their several and respective executors, administrators, and assigns. The share on the death of a proprietor vests in his executors, and although they are not in the Company's books as executors, they become proprietors. The price of the shares is agreed to be paid in the first instance, and is to be paid at such times as the Company shall determine. Before the death of the testator, two periods, and, after his decease, five other periods were fixed for the payment of that which the party was originally bound and had agreed to pay.

It is quite clear the Company meant to have, and the legislature intended they should have a two-fold remedy; first, to enforce the payment of the money, and next, in case they could not get at the money, then that they might declare the shares forfeited, and I do not think that the power to go in and claim the benefit of shares frees the estate of a testator from liability. This power is given to obviate the difficulty of ascertaining who are the persons entitled, and certain forms are prescribed to compel them to come forward, and until they comply with those forms they are not entitled to share the profits.

I consider this a measure for the convenience and security of the Company, but it does not affect the property in the shares, nor the liabilities.

The shares are in the representative. The representative is entitled to the shares. He is therefore liable as the owner of the shares, but until he complies with a regulation for the convenience of the Company he is not to be entitled to receive any of the profits. The Company cannot sell the shares without declaring them forfeited.

If you could have satisfied me that the executors have a

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right to say, they will not have anything to do with the shares, that would be a different thing. The property is in them, the liability is in them, and until the shares are declared forfeited they are, like any other shareholder, liable to the calls. A proprietor is liable to be sued, or liable to incur a forfeiture of his shares, but by the act it is provided that in case it cannot be ascertained on enquiry where a proprietor is, then a notice is to be put in the Gazette; and if he do not pay within a certain time, then his share is to be forfeited. Do you mean to say that you cannot bring an action against him?

It has been argued that the act contains a particular provision applicable to executors. You say, because that particular remedy is given, therefore the general remedy does not apply; but in that case it might be argued that a proprietor could not be sued, as the same argument applies equally to a proprietor under particular circumstances. The calls are incident to the shares and to the interest each person takes in the concern. The words in the 4th section (*a*) are, "all persons who have subscribed, or who shall hereafter subscribe, or who have agreed to pay any sum of money in respect to any such undertaking." I think the moment a person becomes a shareholder, and has an interest as of a shareholder and proprietor, then he becomes liable to all the provisions of the act, and if he die, his representatives stand precisely in the same situation.

I must dismiss this appeal, with costs.

Executors appealing from the judgment of the Court will be held liable to costs, though supporting the Master's report.

On the question of costs, Mr. *Koe* suggested, that the appellants were only executors supporting the Master's report.

THE LORD CHANCELLOR, however, decided, that since there had been a judgment in this Court, the appeal must be at the executors' own risk as to costs.

(*a*) Ante, p. 817.

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COURT OF EXCHEQUER.

Sittings after Trinity Term, 1842.

SMITH *v.* BELL (*a*).

July 7.

THIS was an action of trespass, brought under the order of the Lord Chancellor, (*ante*, p. 799), by the clerk to the Black Sluice Commissioners against the clerk to the Bourn Trustees, for breaking and entering certain lands in Bourn North Fen of the said commissioners, and cutting away the bank of a drain there, &c. Plea, that, by the act (4 & 5 Vict. c. cxiii), all the engines, drains, &c., then already made for the drainage of certain lands, (comprising the drain in question), were vested in the said commis-

By an act, 5 Geo. 3, c. lxxxvi, for draining and improving certain fen lands in B., the said lands, and the banks, drains, works, &c. for the purpose of the said drainage were vested in commissioners. By an act, 4 & 5 Vict. c. cxiii, reciting, that under the above act divers engines and works of drainage had been made, but that the drainage in B. was insufficient, and that the land might be more effectually drained if powers were granted for erecting other engines for discharging the water into the main drain (made under the former act), and to deepen the interior works for such drainage, certain trustees were appointed for carrying the act into execution.

By sect. 62, "every engine, &c. to be erected, and all drains, banks, works, &c., already made, or to be made, were vested in the said trustees. *Proviso*, that nothing in the said act should extend to or affect any drains, banks, works, &c. already made, existing, or provided for the drainage of the lands then vested in the said commissioners."

Sect. 64, empowered the trustees to erect engines and other works in and upon any land in B. not vested in the said commissioners, and to cleanse the drains, &c. in and through the said fen lands, to facilitate the discharge of the water into the main drain, and to make, amend, improve, &c. the sluices, cuts, and other works then already, or thereafter to be made, in, upon, and through the said fens, for effectually draining and preserving the same.

Held, that, according to the fair interpretation of the act, the trustees had a very limited power, (if any), to interfere with any of the drains or works previously vested in the commissioners; that is, supposing they had the power of widening and improving such drains for the general improvement of the drainage, it could only be such a power as was absolutely necessary to carry the act into effect, but that they were not authorized to take the land of the commissioners to make a sluice for a steam-engine erected by them for such purpose.

An act of Parliament is to be construed according to the ordinary and grammatical sense of its language, if there be no inconsistency apparent in its provisions; and a proviso, which, on the face of the act, is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the act, causing such inconsistency. But such proviso will not limit an express authority given by the act.

Held, therefore, that the proviso in sect. 62 must be construed as limiting the general expressions of the act, but not the power expressly given to use the main drain.

(*a*) See the report of the proceedings in Chancery in this case, *nom. Caswell* v. *Bell*, antè, p. 782, and post, p. 886.

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sioners, and that the said drain was one of the works mentioned in the preamble of the said act as works of drainage made under the powers and provisions of an act, 6 Geo. 3, c. lii, and was a work of drainage made under that act, and was situate within the said Bourn North Fen, and one of the interior works for the drainage of the said fens, and a cut or sewer already made through the Bourn North Fen; and that before and at the time when &c., occasion required the said trustees to improve the said drain by making the same wider by twenty-two feet, and to add to it a cut of the said additional width in the said bank, wherefore the said trustees did, according to the provisions of the first-mentioned act, improve the said drain, by making the same wider, &c.; and because the trustees could not otherwise so improve the said drain, they did &c. Replication, *de injurid.*

The action was tried at the Leicester Spring Assizes, before Lord *Abinger*, C. B., when a verdict was taken by consent for the defendant, subject to the opinion of the Court of Exchequer on the following case:—

This action was brought under an order of the Lord Chancellor to try the legal right of the trustees for executing the act of 4 & 5 Vict. to widen a certain drain in Bourn North Fen for the purposes of that act, which drain, by the acts 5 and 10 Geo. 3, (the Black Sluice Acts), and the act 6 Geo. 3, (the Bourn Inclosure Act), and the award made under it, was vested in the Black Sluice Commissioners. The whole of the lands called Bourn North Fen and Dyke Fen were situate in the parish of Bourn, and comprised about 4600 acres of land, part of an extensive district of low marsh land, consisting of 64,000 acres, under the jurisdiction of the Black Sluice Commissioners, lying between Bourn and Boston-haven, Bourn being the part most remote from the outfall. At the time the act 4 & 5 Vict. passed, the lands in the Bourn North Fen and Dyke Fen were very inefficiently

drained, the waters frequently in time of floods covering the lands and lying in the houses for weeks together, great damage being occasioned thereby. In order, therefore, that the said lands in the Bourn North Fen and Dyke Fen might be more effectually drained, that act of Parliament was passed, but not without great opposition on the part of some of the Level, and the majority of the Black Sluice Commissioners. In order to bring a sufficient supply of water to the engine mentioned in the act, and to work such engine, it was indispensable to provide a reservoir or feeder for the engine, which has been done by extending that portion of the drain in question called the Mill Drain, formerly used as a mill or tail-drain to a wind-engine, from its former width of 18 feet to the width of 40 feet, which would be an increase of 22 feet. This increased width would be of itself an improvement to the drainage, quite independently of the engine, though in that point of view it might not perhaps have been necessary to widen it to so great an extent. The Mill Drain discharges the water from the said fens direct into the Forty Foot Drain. The actual quantity of land taken by the increased width is three roods and six perches, and is taken from a farm vested in the Black Sluice Commissioners.

It was impossible to widen the drain, or any other drain in the fens, so as to increase the capacity of it to take off the water, without cutting some bank vested in the Black Sluice Commissioners, because all the drains, banks, engines, and other works of drainage then existing or provided (this drain being one of them), were, by the Black Sluice and Inclosure Acts of Parliament previously referred to, and the award made by virtue of the Bourn Inclosure Act, vested in them. A mode had been suggested by one of the defendant's witnesses of purchasing land not vested in the Black Sluice Commissioners, on the contrary side of the road, but the engineer thought that mode not so

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effectual and more expensive, and it was therefore abandoned. But no reservoir could be made any where without cutting into some of the banks and drains vested in the Black Sluice Commissioners.

The acts of trespass complained of were committed by the trustees of the act 4 & 5 Vict., in the supposed prosecution of their powers under that act, but what has been done to the Mill Drain does not come under the description of cleansing.

The acts of Parliament herein previously mentioned, and the award are to form part of the case, and to be referred to by both parties.

If the Court should be of opinion that the trustees were justified, the verdict is to stand: if they were not, a verdict is to be entered for the plaintiff (*a*).

M. D. Hill, for the defendant (*b*), contended, that the proviso in the 62nd section was to be construed as limiting the effect of that clause only, and not of the act generally.

R. Hildyard, for the plaintiff, distinguished between public and private acts of Parliament; that in the former the initiative is with the legislature, in the latter with the parties to it, and that it is their fault if they choose to accept the acts under conditions, which, connected with local circumstances, would render the act ineffectual.

Blakemore v. *The Glamorganshire Canal Navigation* (*c*); *Lee* v. *Milner* (*d*); *Kemp* v. *The London and Brighton Railway Company* (*e*); and Dwarris on Statutes, p. 773, were cited.

Cur. adv. vult.

(*a*) See the material sections of the several acts set out at length, antè, p. 782.

(*b*) June 25, before *Parke*, *Alderson*, *Gurney*, and *Rolfe*, Bs.

(*c*) 1 M. & K. 154.

(*d*) 2 Y. & C. 611.

(*e*) Antè, Vol. 1, 495.

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PARKE, B., now delivered the judgment of the Court. —The opinion which the Court has formed after a full consideration of this case is, that the plaintiff is entitled to our judgment.

The question arises on the construction of the 4 & 5 Vict. c. cxiii, the provisions of which are at first sight apparently inconsistent; but we think they may be reconciled, and that according to the fair interpretation of the act, the Bourn Drainage Trustees have no power to interfere with any of the drains and works in that district previously vested in the Black Sluice Commissioners, except perhaps in a very limited degree, which will be explained; and certainly that they had no power to do what they have done, as stated in the special case.

The act recites the 6 Geo. 3, c. lii, under which the drainage works in the Bourn North Fen and Dyke Fen were vested in the Black Sluice Commissioners; it recites also, that engines and works of drainage were made under that act, but that the engines were dilapidated and had been removed, and that the means of drainage for the fen were very imperfect and insufficient; that the lands in those fens might be more effectually drained if powers were given to erect steam-engines to discharge the waters into the Main or Forty-foot Drain, and also to deepen and improve the interior works for the more effectual drainage of those fens; and the act then proceeds to appoint trustees for those purposes, and several enactments are made for their government, to which it is unnecessary to advert. The sections which give rise to the question in the case are the 62nd and the 64th. [His Lordship read the 62nd section.]

The defendant proposes to limit the effect of the proviso by construing it to defeat the previous clause only, and preserve in the commissioners the property in the works already vested in them, leaving the control over those works to the trustees, as if the proviso had been, that nothing in that *clause* (instead of that *act*) contained should

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extend to, or affect the works already vested in the commissioners; a somewhat singular provision, if it were still intended to give the trustees the control and management of them.

The plaintiff, on the other hand, contends that the true construction of the proviso is that according to the ordinary and grammatical sense of the words, and that it exempts all works vested in the commissioners altogether from the operation of every part of the act; and this we think is the true interpretation of the clause. Undoubtedly it is, according to one of the established rules of construction, to be so read, unless, being so read, it would be absurd, or inconsistent with the declared intention of the legislature to be collected from the rest of the act. At first sight the proviso so constructed would seem inconsistent, but on a further examination it is not; and it is unquestionably the duty of the Court to reconcile, if possible, the various enactments of the statute, which we think may be done, and with little, if any, modification of the language of any part of it.

Adopting the grammatical construction, and supposing that the trustees have no power in any way to meddle with the drains or works vested in the Black Sluice Commissioners, they may still have all necessary powers to make the drainage effectual, so far as appears on the face of the act itself.

They are authorized to make fresh drains, and watercourses and other works, and have thus the power of deepening and improving the interior works of drainage generally, so as to come within the meaning of the preamble, though they have no power to deepen or improve the identical works already under the control of the commissioners. The words of the 62nd section would be satisfied by supposing that the legislature meant to vest in the trustees all works then already constructed, if there should be any, by the trustees themselves, or by other persons than the commissioners;

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and who shall say that the legislature did not contemplate such a case? and then the proviso is rendered quite consistent with the clause itself. So the power in the 64th section, to cleanse drains and watercourses, may be explained by referring it to any other drains that may exist, even private drains, if occasion required, for the general benefit of the drainage; and the powers to improve sluices, bridges, &c. already made, may be explained in the same way.

Authority is given to make, as occasion may require, new sluices, bridges, tunnels, &c., and to amend and improve them; and such being the principal object of the power, any existing sluices and drains that there may be, so always that they do not belong to the Black Sluice Commissioners, are included for the sake of caution.

Thus the whole act is, on the face of it, rendered consistent. Ample powers are given to the drainage trustees, and all the works and the drains of the Black Sluice Commissioners in the Bourn North Fen are continued in them, with all the powers belonging to them by their acts of Parliament, unimpaired or unaffected by the enactments of this, in conformity with the clear and positive language of the proviso.

But then it is said, if the proviso should be so construed the trustees could not carry the act into effect at all, because they could not interfere with the Main or Forty-foot Drain, which is clearly vested in the commissioners, by discharging the water into it.

It appears to us to be a sufficient answer to say, that the proviso ought to be construed as affecting and limiting the general expressions in the act, but not the express and positive authority given by it to use the Main or Forty-foot Drain, which power it is the great object of the act to give; and besides, it does not appear on the special case, that any part of this drain is in the Bourn North Fen, to the interior drainage of which alone the act applies.

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Thus, on the face of the act itself, the whole is rendered sensible and consistent. But it is argued, that on the facts stated in the special case it would be impossible to carry into effect the acknowledged object of the act, the erection of a steam-engine to drain the North Bourn Fen, without interfering with the works of the commissioners, for a reservoir is found to be "essential to a steam-engine," and "that," it is found, "could not be made anywhere without cutting into some of the banks and drains vested in the commissioners." It may, however, well be doubted, whether, if the act on the face of it be consistent, and give no power to interfere with the banks and drains vested in the commissioners, Parliament is to be supposed to have given such a power, because, from something that does not appear on the face of the statute, from peculiar local circumstances which may never have been known to the legislature, the trustees, without such power, could not carry its enactments into effect. Are we not to infer that the legislature granted the authority which the trustees possess under the impression that it would not in any way interfere with the rights of the commissioners, which are expressly protected? and can we say that Parliament would have granted it at all if the fact had been disclosed, that the authority could not be exercised without such interference? And if the act, in consequence of local peculiarities, become incapable of being carried into effect, is it not reasonable that the petitioners for it should suffer for their default, rather than those whose interest it is expressly provided shall be saved harmless? But even supposing such a power was given, it could only be given to the extent of authorizing such interference with the property of the commissioners as was absolutely necessary for carrying the act into effect; that is, the reservoir ought to have been so constructed, as to require as little cutting as might be through the bank of the drains; and more has certainly been done in this case.

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We think, therefore, that the trustees were not authorized to enlarge the drain at all by virtue of the powers of this act, it not being found to be absolutely necessary for the construction of the reservoir, but the contrary.

Whatever doubt we may have entertained on this part of the case, we do not feel any on the question as to the trustees having violated the act of Parliament in the mode of constructing the steam-engine and its reservoir. By the 64th section they are to construct the steam-engine, its pits and sluices, on other land than that which belongs to the commissioners: a provision which strongly confirms the opinion that the legislature intended to leave them wholly unaffected by the act, except so far as they would be by the pumping of the water; also by its passage along the main drain.

Now, supposing that the trustees had the power of widening and improving the drains vested in the commissioners, for the general improvement of the drainage of the North Bourn Fen, and the communication with the main drain, they had no power to take land of the commissioners for the purpose of making a sluice for such steam-engine. It appears by the special case that they have done so, and, as it does not find that all they took was necessary for the improvement of the drainage, they were not justified in doing the acts done.

Judgment for the plaintiff.

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COURT OF CHANCERY.

Nov. 10.

CASWELL *v.* BELL.

An application made by the defendants for the purpose of varying the injunction granted in this cause, so far as it prevented them from making a cut into the drain vested in the Black Sluice Commissioners (the defendants having purchased a piece of land for their reservoir extending up to the margin of the drain), was refused with costs.

Costs of an action of trespass, directed to be brought by the Court of Chancery, will not be costs in the cause, but must be paid by the party against whom the verdict is given.

THE judgment of the Barons of the Exchequer having been returned into the Court of Chancery, a motion was made by the defendant in this suit for the purpose of procuring a variation in the order made by his Lordship in this cause on the 26th February, 1842 (*a*), so far as it prevented them from making a cut into the drain in the pleadings mentioned, in such manner as might be necessary for working the engine erected by the Bourn North Fen and Dyke Fen Trustees, upon land purchased by them under their act; and that the injunction awarded against them might be dissolved, or varied accordingly. Or that the said order might be varied and the said injunction dissolved, so and in such manner as to enable the said trustees to use the said steam-engine for the purposes pointed out in, and prescribed by the said act, and that the costs of the action at law prescribed by the said order might be made costs in the cause.

The affidavits of the defendants stated, that they had purchased a piece of land not vested in the Black Sluice Commissioners. That the whole of the machinery, buildings, and sluices, pits, and other necessary works were intended to be erected upon the piece of land so purchased. That, for the purpose of working their steam-engine, it would be absolutely necessary to make a cut from the said piece of land into the public mill drain (being the drain, any part of the banks of which the trustees were, by the injunction granted in this cause, restrained from cutting away and removing). That such cut could be made with-

(*a*) Antè, p. 798.

out altering the level of the surface of the land on either side of such drain. That there were no artificial banks to the public mill drain, and that the banks were cultivated by the respective owners up to the edge of such drains.

Mr. *Stuart* and Mr. *Walford*, in support of the motion. —The Court is not asked to vary the injunction so as to enable the Bourn Trustees to take land belonging to the Black Sluice Commissioners; all that is asked is, that the injunction may be varied, so far as it restrains the Bourn Trustees from making a cut from and through their own land into the public mill drain: the Bourn Trustees being the absolute owners of the soil or ground through which such cut is proposed to be made, up to the very margin of the drain. The injunction ought to be varied as asked, the same having been granted on the express undertaking of the plaintiffs to try the legal questions raised by the pleadings, which they have not done, the action brought by them being an action of trespass for taking particular land belonging to the Black Sluice Commissioners, and not for interfering with the banks of the drain; and the judgment of the Barons of the Exchequer being expressly founded upon the question, how far the Bourn Trustees were justified in taking such particular land: *Ward* v. *Cecil* (*a*).

Mr. *Hildyard*, *contrà*.—The banks of the public mill drain are vested in the Black Sluice Commissioners, and regard being had to the proviso in the 62nd section of the Bourn Trustee Act, the defendants have no right to make the proposed cut.

The judgment of the Barons of the Exchequer decides the general question as to the construction to be put upon the proviso in the 62nd section of the Bourn Trustee

(*a*) 2 Ves. 711.

1842.
CASWELL v. BELL.

Act. The variation of the injunction as asked will only tend to prolong litigation, when the result of such litigation is obvious, from the opinion already expressed by the Barons of the Exchequer.

THE LORD CHANCELLOR.—The plaintiffs are unquestionably entitled to the costs of the trial. The defendants have committed a trespass, and a trespass to a very considerable extent. The plaintiffs brought their action; the Court are of opinion they are entitled to maintain that action, and they ought to have their costs.

This is a question of law, and as a question of law turning on the construction of an act of Parliament it was submitted to the Court of Exchequer. It turned entirely on what was the proper construction of the act of Parliament. Taking the general and comprehensive words of the act of Parliament in connection with the proviso, the Court of Exchequer have put a construction on the act of Parliament; and they say, in their opinion, the clear construction of the act of Parliament is, that you have no right to interfere with the works. If I were now to do what the defendants desire, viz. to strike these words out of the injunction, another action would have to be tried. And the Court of Exchequer must, to be consistent with itself, pronounce precisely the same judgment as it has now done. Certainly I should not be authorized in placing the parties or the Court in that situation. Therefore, I apprehend I cannot vary the terms of the original injunction: the application must be dismissed with the ordinary consequences.

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(*Equity.*)

1. The defendant and his family were lessees, under the Dean and Chapter of Durham, of a close of land situate near South Shields, called "The Deeps," there being reserved to the lessors all mines and minerals, and the liberty of getting and carrying away the same, and all powers of entry for that purpose, and particularly of laying, making, and granting waggon-ways over the premises, paying reasonable damage.

The defendant had originated a project of a public railway for carrying mineral produce and millstones from S. to M. (the terminus being distant 19 miles from South Shields), and had associated with himself certain co-adventurers; he subsequently retired from the concern for a pecuniary consideration paid by his co-adventurers, and he undertook to assist them in carrying out their project.

Subsequently to the retirement of the defendant, the co-adventurers adopted the style of the S. and T. Railroad Company, and they extended the project from M. to S. Shields, and having obtained from the Dean and Chapter a grant of their reserved rights, completed a public railway, with a double line of rails, for general purposes, which passed through "The Deeps."

The defendant brought an action of trespass against the Company, on the ground that the reservation in his lease did not authorize the lessors or their grantees to make a public railway for general purposes. The Company pleaded (among other pleas) leave and license by the Dean and Chapter, and also by the plaintiff.

The Company filed their bill, and besides the grounds taken by their pleas, insisted that the defendant had full notice of the extended project, at the time of his retiring and of his making the agreement; that he had full knowledge of the works and the intentions of the Company whilst the railway was in progress; and having permitted the Company to expend money thereon, was precluded in equity from asserting his legal rights, if any. The common injunction was obtained on default of answer. The defendants on putting in their answer obtained the order nisi for dissolving the injunction, which, on cause shewn on the merits, was continued by the Master of the Rolls:—*Held*, by the Lord Chancellor, that three questions were involved; 1st, the extent of the reservation to the lessors; 2nd, the construction of the agreement of the defendant; 3rd, whether there were equitable circumstances debarring the defendant from asserting his legal rights.

That the two first questions were purely questions of law, and if either of them were decided in favour of the Company there would be no question for equity.

That the third question was one which could not properly be decided on an interlocutory application.

That the action at law ought to proceed, with liberty to the Company to apply, if both the two first questions were decided against them, in which event, the damages to the lessee by reason of the railway would be estimated by a jury. *Barnard* v. *Wallis*, 162

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BANKRUPT.

1. A Railway Company entered into a contract (dated December 27, 1836), with certain builders, R. R. and J. P. R., for building a bridge, all necessary implements and materials to be found by the builders, with power to the Company, if, in the

opinion of their architect, the said contractors should not proceed with sufficient expedition, to employ other or additional workmen to complete the works, giving seven days' notice of such intention ; and in such case, to use the cranes, machines, implements, and materials used on or about the works by the said contractors, who were to defray the extra expense so incurred. The contract also provided, that the Company should have a lien upon such machines, implements, and materials, as should, for the time being, be in and upon the land, as a security for the completion of the bridge.

On the 26th July, 1837, the contractors committed an act of bankruptcy, and a fiat was issued on the 31st. Divers goods, timbers, &c., for building the bridge, had been previously deposited by them on it and the land adjoining. These consisted of four kinds : — 1. Those actually on the line of the railway, value 612*l.* 13*s.* 6*d.* 2. Those upon land adjoining the line of railway, (not the property of the Company, but inclosed and taken possession of by them under the act), value 634*l.* 13*s.* 9*d.* 3. Those deposited upon the line of a temporary railway, made by the bankrupts, over land not belonging to the Company, for the convenience of conveying materials. The value of these was 7*l.* 19*s.* 6*d.*; that of the materials of the temporary railway, 131*l.* 15*s.* 4*d.* 4. A crane, erected by the contractors at the end of the temporary railway, value £50.

On the 31st of July, the Company took possession of all these goods. On the 1st of August, they gave the seven days' notice, that other workmen would be employed ; and on the 2nd, they took upon themselves the completion of the bridge, using some of the goods and retaining the remainder. In an action of trover, brought by the assignees of the bankrupts for these goods :—*Held*, that the Company had a lien on the 1st and 2nd classes, but not upon the 3rd and 4th, which nevertheless, at the expiration of the notice, they had a right to retain and use about the work.

Where, in trover, the defendant justifies under a right to use the goods for a particular purpose, and within a particular locality, and he has used them in a different manner or locality, the plaintiff should new-assign. *Hawthorn* v. *The Newcastle-upon-Tyne and North Shields Railway Co.*, 288

2. A contract between a Railway Company and a builder contained a clause, that in case the latter should become insolvent, or be declared bankrupt, or should from any cause whatever, other than the act of the Company, &c., be prevented from proceeding with the works, it should be lawful for the Company to give him a notice in writing requiring him to proceed with the works, and that in case he should for seven days after such notice make default, it should be lawful for the Company to employ other workmen, &c., and that all the tools and materials delivered for the purpose of the works thereby contracted for, and then being upon and about the site thereof, should, upon such default become, and be in all respects considered as the absolute property of the Company. The Company gave notice to the contractor on the 11th of April ; on the 17th he committed an act of bankruptcy, and on the 18th they entered upon the works :—*Held*, in an action of trover brought by the bankrupt's assignee against the Company for the tools and materials which were on the works on the 17th, that he was entitled to recover them.

A letter written by the contractor, in which he stated that he was absent from home, to avoid two writs ; *held*

admissible evidence of an act of bankruptcy on the day of the date, although there was no other evidence of the writs being issued or other pressure by creditors. *Rouch* v. *The Great Western Railway Co.*, 505

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By a Railway Act (6 Will. 4, c. lxxxvii, s. 108,) it was provided, that it should be competent to inspect all books, &c., relating to the Company, at any general or special meeting, which general meetings (by sect. 98) are to be held every six months. An application having been made to the Court on the part of a defendant, against whom an action for calls had been commenced, and who had not availed himself of the privilege, to order an inspection of the minute-book of the directors, to enable him to ascertain whether there were a competent body present to make the call in question, the Court refused to make the order.

Semble, that taking out a summons before a judge at chambers is sufficient demand of inspection from the directors. *The Birmingham, Bristol, and Thames Junction Railway Co.* v. *White*, 863

BRIDGE.

(*Equity.*)

See DAMAGE, 1.

The Manchester and Leeds Railway Act enables the Company to make the Railway in a prescribed course.

The 34th sect. reciting that the Railway is to be carried across the Aire and Calder Navigation at three specified places, requires the Company to erect bridges at such three crossings, and prescribes the dimensions of such bridges.

The 36th sect. provides that the Company shall, during the progress of constructing such bridges, leave an open uninterrupted navigable waterway of a specified height and extent, and imposes penalties on non-compliance with its provisions.

The 42nd and 44th sects. provide that the Company shall not make any bridge over the navigation, and generally shall not interfere therewith, otherwise than as provided for by the act.

The 94th sect. empowers the Company, subject to the restrictions imposed by the act, to make and maintain the railway, and to construct in, under, upon, across, or over any hills, valleys, roads, rivers, canals, brooks, or streams, or other waters, such embankments, bridges, aqueducts and conduits, either temporary or permanent, and to erect and construct such buildings, engines, machinery, apparatus and other works and conveniences for the purposes of the act as the Company shall think proper.

By an agreement made between the Navigation and Railway Companies, and afterwards embodied in an act of Parliament, the line of the railway was changed, by which change the navigation was crossed only once by the railway, and only one bridge required. The Railway Company had introduced into the above agreement

a clause, enabling them to erect temporary bridges across the navigation, but which was struck out by the Navigation Company.

The Railway Company having commenced the building of the permanent bridge, erected a temporary bridge adjoining to the permanent bridge, which was used partly for building that bridge and partly for conveying earth and materials across the river. On the application of the Navigation Company, an injunction was granted *ex parte* restraining the erecting of a temporary bridge across the navigation or of any thing impeding the navigation in a manner not authorized by the act.

Affidavits were filed on both sides, and upon motion to dissolve the injunction: — *Held*, by *Alderson*, B., that, subject to the restriction of the act, the 94th sect. ought to be liberally carried into effect; that the Railway Company had the power of erecting such a temporary bridge, the power being exercised reasonably and *bonâ fide*: that in construing such power with a view to its reasonable and *bonâ fide* exercise, regard must be had to the peculiar purpose for which the permanent bridge was designed.

That the temporary bridge being of the dimensions specified in the 34th sect., and a navigable water-way being left as required by the 38th sect., the same was lawfully erected under the 94th sect. for the *bonâ fide* purposes of building the permanent bridge.

That the temporary bridge being erected and used for a lawful purpose, might also be used for other purposes for which alone it could not have been erected.

That, subject to the restrictions of the act, the Company, acting *bonâ fide*, were constituted the judges of the mode of executing their works, circumstances upon which the Court was of opinion that the temporary bridge was reasonably and *bonâ fide* erected, and was unaffected by any circumstances connected with the above-mentioned agreement. As between the two companies no costs were given, although an *ex-parte* injunction was dissolved. *Priestley* v. *The Manchester and Leeds Railway Co.*, 134

(*Law.*)

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BROOKS.

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CALLS.

(*Equity.*)

See SHARES, 1.
LIABILITY OF SUBSCRIBERS, 1, 2.

(*Law.*)

1. By the Southampton Dock Act, 6 Will. 4, c. xxix, it is provided (sect. 84), that in an action for calls, in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the Company is by this act directed (sect. 89) to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein. Section 89 requires the Company from time to time to cause the names, additions, and places of abode of the persons from time to time entitled to shares, with the number of their shares and amount of subscriptions paid thereon, and the proper number by which every such share shall be distinguished, to be entered in a book to be kept by the secretary.

Held, that the provision as to the making the entries is only directory, and that an omission or irregularity in the entries in the book, relating to other shareholders, does not render the book inadmissible against the defendant, as being the book kept under the act.

And that it is not necessary that the entries should be made by the secretary's hand.

Section 63 directs, that the orders and proceedings of every meeting of the Company shall be entered in a book to be kept for that purpose, and shall be signed by the chairman at such meeting; and when so entered and signed, as also the minutes or entries hereinafter (sect. 75) provided to be kept, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, &c., without proof of such meeting having been duly convened, or of the persons making or entering such orders, &c., being proprietors or directors of the Company. Section 75 provides that the directors shall keep a regular minute and entry of the orders and proceedings at every meeting of directors, which shall be signed by the chairman at each respective meeting:—*Held*, that the signature of the minutes by the chairman of the meeting, when presiding at the subsequent meeting, is sufficient.

And that the terms "directors," and "court of directors," are equivalent, so that the calls may be made by a court of directors, and a general meeting is not necessary for that purpose.

The 84th section giving the form of declarations for calls, and the proofs necessary, provides that the Company shall recover what shall appear due, *including interest at £5 per cent:*—*Held*, that it is not necessary to insert a count for interest, which may be added by the jury to the debt claimed for the calls. *The Southampton Dock Company* v. *Richards*, 215

2. In an action by a Railway Company for calls, the declaration stated that the defendant subscribed for a sum of money, to wit, &c., towards the undertaking, and for certain shares therein. In the 195th section of their act it was recited, that part of the capital, authorized (by sect. 1) to be raised, had been subscribed for by several persons "under a contract, binding themselves, their *heirs*, &c." On motion in arrest of judgment, on the ground that the declaration should have alleged the subscription to have been by deed:—*Held*, that the declaration was sufficient after (and *semble* before) verdict.

Semble, also, that in an action against an original subscriber, the Company need not declare specially on the deed executed before the passing of the act, and that a deed is not necessary in the case of subsequent subscribers.

By sect. 119, the subscribers are required to pay their amount of subscription, as called for by the directors, "at such times and places, and to such persons as shall be directed by the said directors." Sect. 121 empowers the directors to make calls, at intervals of three months between the days of payment, and requires that 21 days' notice shall be given of each call by advertisement, and that the money called for shall be paid to such persons, at such times and places, and in such manner, as in the said notice shall be appointed. A resolution of the directors was made for a call of £8, but did not mention the place where, or person to whom the money was to be paid; but the notice (signed by the clerk under sect. 183) did specify those particulars:—*Held*, that assuming the notice to have been the act of the directors, (which was not

disputed at the trial), the call was properly made.

Quære, whether there is a distinction between *proprietors* of shares and *subscribers*. *The Great North of England Railway* v. *Biddulph*, 401

3. By a Railway Act (7 Will. 4, c. xxi, s. 115), it was provided that the directors should have power from time to time to make such calls from the proprietors of shares, as they from time to time should find necessary, with an interval of three calendar months at the least between each call, and 21 days' notice of each by advertisement, and that the proprietors of shares should pay the sums of money subscribed for to such person at such time and place and in such manner as the said directors should from time to time direct or appoint. The directors made a resolution, on the 13th March, "that a call *shall be* made on the 30th of March to be paid on the 1st of May." The resolution did not state the place where, nor the person to whom payment was to be made, but the advertisement of notice inserted in the newspapers did contain those particulars. In an action against a defendant, a proprietor at each of the three dates, and no evidence being given of any change in the directors during that time:—*Held*, that the directors might fix the time, place, and manner of payment after the original resolution had been made, and by a distinct act.

And that the call was not invalid, from the resolution being prospective.

Sect. 150 provided, that if any director should directly or indirectly be concerned in any contract with, or hold any office or place of trust or profit under the Company, he should be thereby discharged from the direction:—*Held*, that this clause related to contracts with the Company in execution of their undertaking, and did not disqualify those directors who were also members of a bank employed by the Company.

By sect. 159 it was enacted, that the orders and proceedings of the meetings of the Company should be entered in a book, and signed by the chairman of the meeting, and should be allowed to be read in evidence without proof of the meeting having been duly convened, or of the persons making such orders, &c. being proprietors or directors, or of the signature of the chairman, "all of which shall be presumed:"—*Held*, that it was not necessary to prove that a signature "W. S., deputy chairman," was signed by W. S., or that he was deputy chairman, and presided at the meeting.

Where a defendant, on purchasing his shares, received a transfer with a blank for the name of the purchaser, and stating the consideration untruly, which however he forwarded to the secretary with a claim to be registered as proprietor:—*Held*, that having made such representation to the Company as to induce them to register him, he was precluded by his representation from objecting to the transfer.

And that a transfer of shares from an original subscriber, after the passing of the act, is good, although made before the sealing of the register of proprietors, and although the original subscriber be never registered as a proprietor. *The Sheffield, Ashton-under-Lyne, and Manchester Railway Co.* v. *Woodcock*, 522

4. By a Railway Act, (6 Will. 4, c. lxxxvii, s. 101), it was provided, that proprietors might transfer their shares on certain conditions; that the deed of transfer should be kept by the Company, who were to cause a memorial of such transfer to be entered in a book to be kept for that purpose.

Section 96 gave power to make calls, on giving 21 days' notice, and provided, that if any owner or proprietor *for the time being* should not pay his calls, he should be liable to pay interest; and section 98 provided, that on the trial it should be only necessary to prove that the defendant, *at the time of making such calls*, was a proprietor.

An action was brought by the Company against the defendant for two calls, notice of the first having been given 6th March, payable 9th April, and of the second 23rd June, payable 28th July. A deed of transfer of the shares from the original holder to the defendant was produced, and the transfer book of the Company, containing a memorial of the transfer, both dated 7th April, but there was no other evidence of the time when the entry was made:—

Held, that the transfer book was admissible, and was reasonable evidence to shew the entry was made when it bore date; and that the defendant, not having been a proprietor till 7th April, after the day when the first call was *made* (not *payable*), was not liable to the first, but only to the second. *The Aylesbury Railway Co. v. Thompson*, 668

5. By a Railway Act (6 Will. 4, c. lxxxvii,) the Company are authorized (s. 95) to sue *subscribers* who neglect to pay the calls on their shares. Sect. 96 empowers the directors to make calls of money from the *subscribers* and *proprietors for the time being*, and, in default of payment, to sue for the calls or to declare the shares forfeited. Sect. 98 provides, that in an action against such proprietor for the time being, it shall be sufficient to declare that the defendant being a proprietor of a share is indebted in £— for a call, whereby an action hath accrued to the Company, without setting forth the special matter; and sufficient to prove that the defendant at the time of making such call was a proprietor of a share, and that the call was made and notice given as directed by the act. Sect. 101 enables proprietors to sell their shares; providing that on every such sale the deed or conveyance executed by the seller and purchaser shall be kept by the Company, who shall enter in a book a memorial of the transfer, and indorse the entry thereof on the deed, and on the certificate of the share sold: and until such memorial shall have been made and entered, the seller shall remain liable for calls, and the purchaser shall have no part of the profits, nor interest paid, nor vote in respect of such share. Sect. 102 prohibits the sale by any person of any share on which a call shall have been made, *after the day appointed for payment of the same*, unless at the time of such sale he shall have paid the full sum called for in respect thereof.

In an action for calls, the declaration stated, that the defendant, having before the commencement of the suit been a proprietor of shares, was and still is indebted to the Company for a call on each of such shares, and that by reason of the calls remaining unpaid an action had accrued to the plaintiffs. Plea, That the call was made payable on ——, and that the defendant transferred his shares by deed to one C. T., and that the Company entered a memorial of the transfer, according to the provisions of the act, before the call was payable. Verification. On special demurrer to this plea:—

Held, that no right of action for a call is given by the act, or exists independently of it, against a party (not appearing to be an original subscriber) who had held a share at the time a call was made, but who had transferred and entered a memorial of his

transfer before the call was payable; and that the duty to pay a call in such case does not arise until the day appointed by the directors for payment.

Held also, that supposing the declaration did shew a cause of action, it was well answered by the plea, which was good in substance and in form, and properly concluded with a verification.

Semble, that there are only three cases in which an action for calls can be maintained under the act. 1. Against *a subscriber*, under sect. 95. 2. Against *an owner for the time being*, under sect. 96. 3. Against a party who having transferred his shares is no longer a shareholder, but whose liability is continued by sect. 101, no memorial of transfer having been entered. *The Same* v. *Mount*, 679

6. No undertaking implied by law to indemnify against subsequent calls. *Humble* v. *Langston*, 533

CARRIER.

1. In an action against a Railway Company as common carriers, for refusing to carry and convey goods, the declaration averred, that the "plaintiffs were ready and willing, and then offered to pay the defendants such sum of money as they were legally entitled to receive, for the receipt and carriage and conveyance of the said goods, and all other charges whatsoever, to wit, the sum of £2."—*Held*, sufficient on special demurrer, and that it was not necessary to make, or to aver a strict legal tender. *Pickford* v. *The Grand Junction Railway Co.*, 592

2. The Lancaster and Preston Junction Railway unites at Preston with the North Union Railway, and that line afterwards with another, and so on into Derbyshire. A parcel directed to a person in Derbyshire was delivered at Lancaster to the Lancaster and Preston Railway Company, who were known only to be proprietors of the line of railway as far as Preston; on the person bringing the parcel offering to pay the carriage, the book-keeper said it had better be paid by the person to whom it was directed on the receipt of it. The parcel arrived safe at Preston, was forwarded from thence by the North Union Railway, and afterwards lost: —*Held*, that the Lancaster and Preston Railway Company were liable for the loss of it. *Muschamp* v. *The Lancaster and Preston Railway Co.*, 607

CERTIORARI.

By the Bristol and Exeter Railway Act (6 Will. 4, c. xxxvi, ss. 5 & 7), it was provided, "that the Company should make the railway and other works, by the said act authorized, on or through the lands delineated on the maps or plans, and described in the book of reference deposited with the clerk of the peace, unless where land had been omitted by mistake, and such mistake certified by two justices;"

By section 59, "that the Company, in making the said railway, &c., should not deviate more than 100 yards from the line delineated in the map;"

By section 25, "that when damage done to a mansion was the subject of inquiry, such question should be tried by a special jury;"

And by section 235, it was enacted, "that no proceedings had or taken in pursuance of the act should be removed by certiorari."

The Company were said to have exceeded their power in three in-

stances:—1st, by making the railway through a piece of land, not included in the plan or book of reference, and not certified to have been omitted by mistake; 2ndly, by deviating more than 100 yards from the line delineated; 3rdly, the inquisition related to damage done to a mansion, and did not purport to have been taken by a special jury.

Held, that the proper remedy for this excess of jurisdiction was by action of trespass, and the Court refused to grant a *certiorari*. *Regina* v. *The Bristol and Exeter Railway Co.*, 99

CHAIRMAN (SIGNATURE OF).

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COMMISSIONERS OF PAVING.

An information was filed at the relation of one of the commissioners appointed under 12 Geo. 3, and 57 Geo. 3, against the Eastern Counties Railway Company and the Northern and Eastern Railway Company, for the purpose of restraining them by injunction, from constructing or making any covering or building over certain streets and courts within the jurisdiction of the said acts.

The defendants were desirous of building a station, and for that purpose proceeded, under the powers of their act, to arch over certain streets within the jurisdiction of the said Paving Commissioners:—*Held* by the Lord Chancellor, on appeal, that an injunction should issue to restrain the defendants from constructing or making any covering or building over the streets in question, further or otherwise than might be necessary for the purpose of constructing the *railway*, but at the same time directed a case for the opinion of the Barons of the Court of Exchequer, as to the right of the Company to cover in or build over such streets for the purposes of a *station*.

Their Lordships having certified that they were of opinion that the defendants were entitled, if it was necessary or reasonably convenient for the construction of a station and proper warehouses, to construct such coverings or buildings, by arches or otherwise, over the streets within the jurisdiction of the Paving Commissioners:—*Held*, that the injunction should be dissolved, the fact of the commencement of the works by the defendants being sufficient proof of the necessity for, and the convenience of such buildings. *Att.-Gen.* v. *The Eastern Counties and Northern and Eastern Railway Companies*, 823

COMMUNICATION.

By a Railway Act (3 Will. 4, c. xxxiv, s. 183), it is enacted, that it shall be lawful for the owners and occupiers of lands through which the railways shall be made (except in cases in which the Company shall, at their own expense, have made communications from the land on one

side of the railway to the land on the other, according to an agreement with the owner, &c., or according to the provisions of this act), at all times, for the purpose of occupying the same lands, to pass and repass, and to lead horses, cattle, &c. directly over and across such parts of the railway as shall be made in or upon their lands. The 180th section had provided, that the Company shall at their own expense, so soon as the railway shall be laid out and formed, make such communications as two or more justices of the peace shall upon the application of the owner, &c. (in case of any dispute) judge necessary and appoint. Section 186 prohibits any person from riding, leading, or driving any horse, &c. upon the railway, "except only in directly crossing the same as aforesaid, at places *to be appointed* for that purpose, for the necessary occupation of the respective lands through which the railway shall pass."

Held, that until the Company have made a communication, a party whose land has been severed by the railway, has a right to pass from his property on one side of the railway to the other, at any point, and that the words "to be appointed," in section 86, must be read with the addition of "when such places shall have been appointed."

Where a clause in an act of Parliament furnishing a defence to an action of trespass, contains a proviso or exception, the defendant should negative it in his plea; but where the proviso or exception is in another clause, in order to shew the case to be within it, or the former clause not applicable, such matters should be replied. *The Grand Junction Railway Co.* v. *White*, 559

COMPENSATION.

1. By the Bristol and Exeter Railway Act (6 Will. 4, c. xxxvi, ss. 5 & 7), it was provided, "that the Company should make the railway and other works, by the said act authorized, on or through the lands delineated on the maps or plans, and described in the book of reference deposited with the clerk of the peace, unless where land had been omitted by mistake, and such mistake certified by two justices;"

By section 59, "that the Company, in making the said railway, &c., should not deviate more than 100 yards from the line delineated in the map;"

By section 25, "that when damage done to a mansion was the subject of inquiry, such question should be tried by a special jury;"

And by section 235, it was enacted, "that no proceedings had or taken in pursuance of the act should be removed by *certiorari*."

The Company were said to have exceeded their power in three instances:—1st, by making the railway through a piece of land, not included in the plan or book of reference, and not certified to have been omitted by mistake; 2ndly, by deviating more than 100 yards from the line delineated; 3rdly, the inquisition related to damage done to a mansion, and did not purport to have been taken by a special jury.

Held, that the proper remedy for this excess of jurisdiction was by action of trespass, and the Court refused to grant a *certiorari*. *Regina* v. *The Bristol and Exeter Railway Co.*, 99

2. A canal act (33 Geo. 3, c. ciii, s. 31,) provided, that after land, &c., should be set out for making the intended canal, it should be lawful for all persons seised, or possessed of, or interested in any such land, &c., to contract for, sell, and convey the same to the Company; and that all such contracts should be *inrolled* with

the clerk of the peace, &c., and copies thereof be evidence. By sect. 34 commissioners are appointed, (for settling differences between the owners and Company), who, by sect. 41, *by writing* under their hands and seals, with consent of parties, are to determine and adjust the sum to be paid by the Company for the purchase of such lands, &c., or, in case of refusal or incapacity to treat, &c., to summon a jury to assess the sum to be paid, the verdict of which jury is to be binding and conclusive on all parties. Sect. 47 provides, that, upon payment of such sum or sums of money as shall be contracted or agreed for between the parties, or determined or adjusted by the Commissioners, or assessed by such juries *in manner hereinbefore respectively mentioned*, such lands shall be vested in the Company.

Held, that to vest lands in the Company otherwise than by actual conveyance, there must be payment for lands contracted for in writing, or the price of which was adjusted by the commissioners in writing, or the value found by the jury in writing.

And that proof of payment of purchase-money to the owner for lands, without proof of such contract in writing, is not sufficient evidence of title. *The Earl of Harborough* v. *Shardlow*, 253

3. The Hull and Selby Railway Act (6 Will. 4, c. lxxx, s. 69) provides, that "in all cases in which, in the exercise of any of the powers thereby granted, any part of any carriage, horse, or foot road, railway, or tram-road, quay, *wharf*, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers, cattle, or carriages, or for the transporting, conveying, landing, shipping, or depositing of any goods or merchandize, the Company shall, at their own expense, before any such road, quay, wharf, or other communication, shall be cut through, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, or other communication, to be set out and made instead thereof, as convenient for passengers, &c., and for the transporting, conveying, landing, shipping, or depositing of goods or merchandize, as the road, quay, wharf, or other communication so to be cut through, taken, or injured as aforesaid, or as near thereto as may be." (Section 26 prescribes the process for ascertainment by jury of the value of, and past, future, temporary, perpetual, or recurring damages to land to be taken, used, damaged, or injuriously affected by the execution of any of the powers of the act.)

The railway was made to pass in front of a wharf belonging to the plaintiff, between it and low-water mark, separating the frontage from the water, thereby causing inconvenience and risk to the plaintiff in loading and unloading vessels:—*Held*, that, under section 69, the injury is not confined to a *bodily* injury only; but that the plaintiff's wharf was *injured* within the meaning of that section, and that he was entitled to have a new wharf erected for him by the Company, and was not bound to apply for compensation under sect. 26.

Quære, under what circumstances proprietors, who have parted with their shares for the purpose of giving evidence for the Company, can become competent witnesses. *Bell* v. *The Hull and Selby Railway Co.*, 279

4. A railway act (6 Will. 4, c. xiv) provided (s. 78) for summoning a jury to assess compensation in case of disagreement respecting the pur-

chase of land, and *that the party claiming compensation should be plaintiff, and have all such rights and privileges as plaintiffs in actions at law are entitled to.* Section 83 enacted, "that in every case in which the verdict of the jury shall be given for the same or a greater sum than shall have been previously offered by the Company, *all the costs of summoning such jury, and the expenses of witnesses,* shall be defrayed by the said Company; if for a lower sum, then one moiety by each of the parties." Section 84 provided, "that all parties with whom the Company shall have any such dispute, and who shall require a jury to be summoned, shall enter into a bond to bear and pay their proportion of *the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses,* in case any part of such costs and expenses shall fall upon them."

In a case where no offer had been made by the Company, but a jury had been summoned and assessed compensation to the claimant:—*Held,* that the above clauses (notwithstanding the provisions of s. 78) did not entitle the claimant to the costs of the attorney's letters and attendances, nor to the expenses of plans, &c., paid to surveyors not called as witnesses. *Regina* v. *The Sheriff of Warwickshire,* 661

5. By a Canal Act (1 Will. 4, c. lv,) a Company were empowered to take lands for the purpose of their navigation, with provision for a jury to ascertain the sums to be paid as purchase-money and for damage in carrying the act into effect. By sect. 170, it was provided that no mine-owner should work any mine in or under any lands within forty yards of certain tunnels (by which the canal passed under a hill), without the leave of the Company; and by sect. 171, if the Company, instead of insisting upon having the full forty yards left unworked, should require less than thirty yards to be left, then the mine-owner might insist on having a greater quantity, not exceeding thirty yards, left unworked for his security; and the question in dispute as to such last-mentioned quantity was to be tried, settled, and determined by an issue at law.

Sect. 172 provided, that whenever any mine in due course should become workable within forty yards of the tunnels, the mine-owner should give notice to the Company, who thereupon should pay him, (as the case might be), for so much of the forty yards as they should require to be left unworked for their security, or as might be ascertained by the issue to be necessary to be left unworked for his. Provided that no mines should in any case be worked under the tunnels; but whenever any such last-mentioned mines should become workable, satisfaction should be made by the Company for the same, such satisfaction to be settled by an issue at law.

Sect. 178 gave the mode of trying any feigned issue, and enacted, that after trial and verdict, the Court should give judgment for the sum of money awarded by the jury.

Held, that, where a mine had become workable within forty yards of the tunnels, and the Company had required the whole forty yards to be left unworked for their security, the owner of the mine was entitled (under sect. 172) to compensation for the forty yards, but that the only remedy to enforce it was by a feigned issue, and not by an action on the case. *Fenton* v. *The Trent and Mersey Navigation Company,* 837

COMPETENCY.

See EVIDENCE.

COMPLETION OF LINE.

See MANDAMUS, 2.

CONCILIUM.

After the sufficiency of a return to a mandamus has been decided on concilium, any material fact in it may be traversed. *Regina* v. *The North Midland Railway Co.*, 1

CONSTRUCTION OF STATUTES.

(*Equity.*)

1. A clause in a railway act enacted, "That it shall not be lawful for the Company to make or establish any public station, yards, wharfs, waiting, loading or unloading places, warehouses, or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or cattle, or any goods, articles, matters or things, upon the estate of R. G., his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said R. G., his heirs or assigns, for that purpose had and obtained." R. G. filed a bill to restrain the Company from using an engine-house and other buildings erected by them within the prescribed limits:—*Held*, on demurrer, that the word "public," did not necessarily override the whole sentence; and that if it did, every thing connected with the railway must be considered as for the public use. *Gordon* v. *The Cheltenham and Great Western Railway Co.*, 800 & 872

2. The defendants were authorized by an Act (4 & 5 Vict. c. cxiii,) to make certain works for the better drainage of lands, with this proviso: (s. 62)—"That nothing should extend to affect any works already made, or then existing, or provided for the drainage of the land then vested in the plaintiffs." Several clauses of the act being inconsistent with this proviso, the defendants proceeded to widen one of the drains vested in the plaintiffs:—*Held*, on appeal, that the plaintiffs were entitled to an injunction, on their undertaking to bring an action forthwith to try the right at law. *Caswell* v. *Bell*, 782

3. An application made by the defendants for the purpose of varying the injunction granted in this cause, so far as it prevented them from making a cut into the drain vested in the Black Sluice Commissioners (the defendants having purchased a piece of land for their reservoir, extending up to the margin of the drain), was refused with costs. *Caswell* v. *Bell*, 886

4. *Semble*, that Companies have a right to carry on their railway according to the plan laid down in their act, although a junction contemplated in procuring such act, may be frustrated by the abandonment of the line with which it was the original intention of the Company to unite. *The Clarence Railway Co.* v. *The Great North of England, Clarence, and Hartlepool Junction Railway Co.*, 763

(*Law.*)

See CALLS. CONVEYANCE. COSTS. DAMAGE. JURISDICTION. LINE OF RAILWAY. MANDAMUS. MORTGAGE. PLEADING. PORT. RATING. SHARES. TONNAGE.

5. Shares in a Company are not an interest in land, "nor goods, wares, and merchandize," within the 17th section of the Statute of Frauds, (29 Car. 2, c. 3), and therefore a contract for the sale of such shares is not required to be by note in writing, &c. as provided in cases within the said section.

Semble, there is a distinction between these words of the Statute of Frauds, and the words "goods and

chattels," used in the Bankrupt Act (6 Geo. 4, c. 16, s. 72). *Humble* v. *Mitchell*, 70

6. The 6 & 7 Will. 4, c. xxxvi, s. 47, provided that the Company, on payment of such sum as *should have been* awarded by the jury to the owner (or, in case of his neglect or refusal to convey, into the Bank of England) might enter upon and take the lands. That act expired *May 9th*, 1838; but by the 1 Vict. c. xxvi, s. 1, which came into operation *June 12th*, all its powers and authorities were revived. Section 2 repealed that 47th section. Section 12 *revived* the time for taking lands, and extended it to three years from the expiration of the two limited by the former act; and sect. 14 re-enacted sect. 47 in terms. An inquisition was taken under the 6 & 7 Will. 4, and an order made *June the 11th* for the payment of the purchase-money into the Bank; and on *June the 21st* (C. H. P. not having offered to convey) the money was paid in accordingly.

Held, that the 1 Vict. c. xxvi, enabled the Company to act upon and to complete the proceedings of the inquisition taken under 6 & 7 Will. 4, c. xxxvi. *Doe* d. *Payne* v. *The Bristol and Exeter Railway Co.*, 75

7. A canal act (33 Geo. 3, c. ciii, s. 31) provided, that after land, &c., should be set out for making the intended canal, it should be lawful for all persons seised, or possessed of, or interested in any such land, &c., to contract for, sell, and convey the same to the Company; and that all such contracts should be *inrolled* with the clerk of the peace, &c., and copies thereof be evidence. By sect. 34 commissioners are appointed, (for settling differences between the owners and Company), who, by sect. 41, *by writing* under their hands and seals, with consent of parties, are to determine and adjust the sum to be paid by the Company for the purchase of such lands, &c., or, in case of refusal or incapacity to treat, &c., to summon a jury to assess the sum to be paid, the verdict of which jury is to be binding and conclusive on all parties. Sect. 47 provides, that, upon payment of such sum or sums of money as shall be contracted or agreed for between the parties, or determined or adjusted by the commissioners, or assessed by such juries *in manner hereinbefore respectively mentioned*, such lands shall be vested in the Company.

Held, that to vest lands in the Company otherwise than by actual conveyance, there must be payment for lands contracted for in writing, or the price of which was adjusted by the commissioners in writing, or the value found by the jury in writing.

And that proof of payment of purchase-money to the owner for lands, without proof of such contract in writing, is not sufficient evidence of title. *The Earl of Harborough* v. *Shardlow*, 253

8. By an inclosure act (12 Geo. 3, c. xxxviii,) a portion of a certain drain, called the Fleet Drain, which separated the townships of Whitley and Egbrough, in the county of York, was declared, for the purpose of cleansing and repairing, to be in the township of W., which from time to time cleansed it accordingly.

The act 1 Geo. 4, c. xxxix, gave power to the undertakers of the Aire and Calder Navigation to make a navigable canal through the said townships. By sect. 1, they are *enabled* to make proper and convenient drains on the sides of the canal, as a substitute for the Fleet Drain, (a portion of which was intended to be used as part of the line of the canal), and for that purpose to enter lands, &c. By sect. 32, the lands purchased, taken, or used, together with the canal, drains,

&c., thereby authorized to be made, are vested in the undertakers. Section 85 *requires* them, at their own costs, to make a drain on each side of and parallel with the canal, in lieu of that part of the Fleet Drain which would be so destroyed, at least twelve inches deeper than the old drain. Sect. 86 *requires* them to make all such arches, tunnels, culverts, drains, or other passages, over, under, &c., the said canal, as should be sufficient at all times to convey the water clear from the lands adjoining or near to the said canal, without obstructing or impounding the same; and to make such back-drains as might be necessary to carry away any water which might ooze through the banks of the canal: and provides, that all *such* arches, tunnels, culverts, *drains*, back-drains, &c., should, from time to time, be supported, maintained, cleansed, scoured, and kept in good and sufficient repair by the said undertakers.

The substituted drain on the north side of the canal, being straight, did not enter the township of Whitley at all, but was wholly in Egbrough, which was never liable to cleanse or repair the Fleet Drain.

Held, that the general words in section 86 included the specific works mentioned in section 85, and that the undertakers were bound to keep in repair the substituted drains, as well as make them. *Priestley* v. *Foulds*, 422

9. Where the language of an act of Parliament obtained by a Company, imposing a rate or toll upon the public, is ambiguous, that construction is to be adopted which is more favourable to the interest of the public, and against that of the Company. *Barrett* v. *The Stockton and Darlington Railway Co.*, 443

10. By a railway act (3 Will. 4, c. xxxiv, s. 183), it is enacted, "that it shall be lawful for the owners and occupiers of lands through which the railways shall be made (except in cases in which the Company shall, at their own expense, have made communications from the land on one side of the railway to the land on the other, according to an agreement with the owner, &c., or according to the provisions of this act), at all times, for the purpose of occupying the same lands, to pass and repass, and to lead horses, cattle, &c. directly over and across such parts of the railway as shall be made in or upon their lands. The 180th section had provided, that the Company shall at their own expense, so soon as the railway shall be laid out and formed, make such communication as two or more justices of the peace shall upon the application of the owner, &c. (in case of any dispute) judge necessary and appoint. Section 186 prohibits any person from riding, leading, or driving any horse, &c. upon the railway "except only in directly crossing the same as aforesaid, at places *to be appointed* for that purpose, for the necessary occupation of the respective lands through which the railway shall pass."

Held, that until the Company have made a communication, a party whose land has been severed by the railway, has a right to pass from his property on one side of the railway to the other, at any point, and that the words "to be appointed" in section 86 must be read with the addition of "when such places shall have been appointed."

Where a clause in an act of Parliament furnishing a defence to an action of trespass contains a proviso or exception, the defendant should negative it in his plea; but where the proviso or exception is in another clause, in order to shew the case to be within it, or the former clause not applicable, such matters should be replied. *The Grand Junction Railway Co.* v. *White*, 559

11. By a canal act (1 Will. 4, c. lv,) a Company were empowered to take lands for the purpose of their navigation, with provision for a jury to ascertain the sums to be paid as purchase-money and for damage in carrying the act into effect. By sect. 170, it was provided that no mine-owner should work any mine in or under any lands within forty yards of certain tunnels (by which the canal passed under a hill), without the leave of the Company; and by sect. 171, if the Company, instead of insisting upon having the full forty yards left unworked, should require less than thirty yards to be left, then the mine-owner might insist on having a greater quantity, not exceeding thirty yards, left unworked for his security; and the question in dispute as to such last-mentioned quantity was to be tried, settled, and determined by an issue at law.

Sect. 172 provided, that whenever any mine in due course should become workable within forty yards of the tunnels, the mine-owner should give notice to the Company, who thereupon should pay him, (as the case might be), for so much of the forty yards as they should require to be left unworked for their security, or as might be ascertained by the issue to be necessary to be left unworked for his. Provided that no mines should in any case be worked under the tunnels; but whenever any such last-mentioned mines should become workable, satisfaction should be made by the Company for the same, such satisfaction to be settled by an issue at law.

Sect. 178 gave the mode of trying any feigned issue, and enacted, that after trial and verdict, the Court should give judgment for the sum of money awarded by the jury.

Held, that, where a mine had become workable within forty yards of the tunnels, and the Company had required the whole forty yards to be left unworked for their security, the owner of the mine was entitled (under sect. 172) to compensation for the forty yards, but that the only remedy to enforce it was by a feigned issue, and not by an action on the case. *Fenton* v. *The Trent and Mersey Navigation Co.*, 837

12. By an act, 5 Geo. 3, c. lxxxvi, for draining and improving certain fen lands in B., the said lands, and the banks, drains, works, &c. for the purpose of the said drainage were vested in commissioners. By an act, 4 & 5 Vict. c. cxiii, reciting, that under the above act divers engines and works of drainage had been made, but that the drainage in B. was insufficient, and that the land might be more effectually drained if powers were granted for erecting other engines for discharging the water into the main drain (made under the former act), and to deepen the interior works for such drainage, certain trustees were appointed for carrying the act into execution. By sect. 62, "every engine, &c. to be erected, and all drains, banks, works, &c., already made, or to be made, were vested in the said trustees. *Proviso*, that nothing in the said act should extend to or affect any drains, banks, works, &c already made, existing, or provided for the drainage of the lands then vested in the said commissioners." Sect. 64, empowered the trustees to erect engines and other works in and upon any land in B. not vested in the said commissioners, and to cleanse the drains, &c. in and through the said fen lands, to facilitate the discharge of the water into the main drain, and to make, amend, improve, &c. the sluices, cuts, and other works then already, or thereafter to be made, in, upon, and through the said fens, for effectually draining and preserving the same:—*Held*, that, according to the fair interpretation of

the act, the trustees had a very limited power, (if any), to interfere with any of the drains or works previously vested in the commissioners; that is, supposing they had the power of widening and improving such drains for the general improvement of the drainage, it could only be such a power as was absolutely necessary to carry the act into effect, but that they were not authorized to take the land of the commissioners to make a sluice for a steam-engine erected by them for such purpose.

An act of Parliament is to be construed according to the ordinary and grammatical sense of its language, if there be no inconsistency apparent in its provisions; and a proviso, which, on the face of the act, is not inconsistent with the other enactments of it, is not to be limited in its effect by reason of local circumstances, not apparent on the face of the act, causing such inconsistency. But such proviso will not limit an express authority given by the act:—*Held*, therefore, that the proviso in sect. 62 must be construed as limiting the general expressions of the act, but not the power expressly given to use the main drain. *Smith* v. *Bell*, 877

CONTRACT.

(*Equity.*)

(Implied.) *See* VENDOR AND PURCHASER, 1, 2.

(*Law.*)

See BANKRUPT, 1, 2.
DEED, 3.
ENGINE.
SHARES, 1, 2, 5, 6, 16, 17.

Contracts with Company disqualifying directors. *The Sheffield, Ashton-under-Lyne and Manchester Railway Co.* v. *Woodcock*, 522

CONVENIENCE (PUBLIC).

See MANDAMUS, 4, 6.

CONVEYANCE.

See SHARES.
SPECIFIC PERFORMANCE.

By an act of Parliament certain persons were authorized to make the river *Avon* navigable from B. to H., and to maintain such navigation; and for those purposes (amongst other things) to make new cuts through lands adjoining, and to build bridges and water-locks, and to set out and appoint towing-paths for men, first giving satisfaction to the owners of lands; and commissioners were appointed to settle by inquisition what satisfaction every person should have for such proportion of his lands as should be made use of for such purposes, and what share of such satisfaction every person having a particular estate or interest therein, should receive for his respective interest. The undertakers, in consideration of the expenses, were authorized to take for their own use certain tolls. By a subsequent act, which recited that they had proceeded to *purchase* certain lands under the former act, they were empowered to make a horse-towing-path, with similar provisions as to the purchase of lands. They made the river navigable, and made a certain cut lock and horse towing-path, for the purpose of the navigation, in and upon lands taken by virtue of inquisitions under both acts, which assessed as damages thirty years' purchase to some, and an annual payment to others. No actual conveyances were ever made.

Held, that the Company were liable to be rated to the poor for such cut lock and towing-path, and that no conveyance was necessary for lands taken under such powers. *The Bath River Navigation Co.* v. *Willis*, 7

CORONER (INQUISITION).

See COMPENSATION.

The Court quashed a coroner's inquisition, which described the en-

gine and carriage moving to the death, as the goods and chattels, and in possession of "The Proprietors of the Hull and Selby Railway," that not being their name of incorporation. *Regina* v. *West*, 613

COSTS.

(*Equity.*)

See SPECIFIC PERFORMANCE.

1. Executors appealing from the judgment of the Court will be held liable to costs, though supporting the Master's Report. *Fyler* v. *Fyler*, 873

2. Costs of an action of trespass directed to be brought by the Court of Chancery, will not be costs in the cause, but must be paid by the party against whom the verdict is given. *Caswell* v. *Bell*, 886

(*Law.*)

3. A railway act (6 Will. 4, c. xiv,) provided (s. 78) for summoning a jury to assess compensation in case of disagreement respecting the purchase of land, *and that the party claiming compensation should be plaintiff, and have all such rights and privileges as plaintiffs in actions at law are entitled to.* Section 83 enacted, "that in every case in which the verdict of the jury shall be given for the same or a greater sum than shall have been previously offered by the Company, *all the costs of summoning such jury, and the expenses of witnesses*, shall be defrayed by the said Company; if for a lower sum, then one moiety by each of the parties." Section 84 provided, "that all parties with whom the Company shall have any such dispute, and who shall require a jury to be summoned, shall enter into a bond to bear and pay their proportion of *the costs and expenses of summoning and returning such jury, and taking such verdict, and of the summoning and attendance of witnesses*, in case any part of such costs and expenses shall fall upon them."

In a case where no offer has been made by the Company, but a jury had been summoned and assessed compensation to the claimant:—*Held*, that the above clauses (notwithstanding the provisions of s. 78) did not entitle the claimant to the costs of the attorney's letters and attendances, nor to the expenses of plans, &c., paid to surveyors not called as witnesses. *Regina* v. *The Sheriff of Warwickshire*, 661

COUNTRY—PLEA CONCLUDING TO.

See PLEADING, 5, 16.

CROSSING RAILWAY.

See COMMUNICATION.

DAMAGE.

(*Equity.*)

1. A Railway Company in the progress of their works proposed to cross a mill-stream by a bridge to be supported in the centre of the mill-stream by two piles placed sixteen feet apart; the bridge was to be six feet in height above the level of the water. The plaintiff, the owner of the mill, asserted that that height was insufficient to allow barges to pass under, and also placing piles in the stream would impede the flow of the water and thereby stop the working of the mill. The Company adduced affidavits of engineers to shew that the level of the railway and the nature of the ground upon which the embankments were founded, prevented them from making the bridge of a greater height; and they also shewed, that over a public navigable river which was connected with the mill-stream, there were some bridges only six feet high, and moreover, that at the time of the passing of their act, there was over this mill-stream a bridge of that height, though such bridge had

since been pulled down by the plaintiff and re-erected of a greater height. That the flow of the water would be in no way impeded by the piles. The plaintiff adduced affidavits of engineers to shew that although some of the bridges over the navigable river were of the height of six feet only, yet that the water under them could be lowered by waste gates. That to obtain a perfect level on the line of the railway, the embankments, and consequently the bridge over the mill stream, ought to be raised two feet.

Held by the Vice-Chancellor, that the act authorizing the Company to conduct their works doing as little damage as possible, the plaintiff, under the circumstances stated, was not entitled to require the Company to build the bridge at the height of more than six feet.

Held by the Lord-Chancellor, that nothing but necessity could justify the Company in carrying on their works in such a manner or on such a level as would cause serious damage to the owner of the land. *Manser* v. *The Northern and Eastern Railway Co.*, 380

(*Law.*)

See COMPENSATION, 1, 3.

ENGINE.

2. The declaration stated that the plaintiff was possessed of a certain house, situate &c., and that the defendants (a Railway Company) were making a railway and excavations, &c., near thereto, and to a certain other house, whereupon it was their duty to take proper precaution in making the said railway, &c. But that the defendants, not regarding their duty, did not take, &c., but so carelessly, &c., proceeded in the works without taking proper precaution to prevent the house near the house of the plaintiff from falling against the plaintiff's; that for want of due precaution on the occasion aforesaid, the said house near the house of the plaintiff gave way and fell against it, whereby, &c.:—*Held*, on general demurrer, that the breach contained a sufficient allegation of the injury to the plaintiff having been caused by the negligence of the defendants.

Precaution here is equivalent to *care and skill*. *Davis* v. *The London and Blackwall Railway Co.*, 308

3. In an action on the case against a Railway Company, the declaration stated, that the defendants, by their servants, so carelessly, negligently, and improperly managed their steam-engine, and the fire therein contained, that through such negligence, &c., divers sparks and portions of the said fire passed from the steam-engine of the defendants, to, into, and upon a certain rick of beans of the plaintiff, standing in a field near the said railway, which by means thereof became ignited, burnt, and consumed. Plea, not guilty.

In a special case, stated for the opinion of the Court under a judge's order, (by 3 & 4 Will. 4, c. 42, s. 25), it was stated, that the plaintiff had erected the rick about eleven yards from the rails of the railway; that the engines and boiler used upon this railway were such as are usually employed on railways, and were used, at the time of setting fire to the rick, in the ordinary manner, and for the purposes authorized by the act.

Held, that upon this statement, there was evidence for the jury on the question of negligence in the defendants, and that they were not entitled to a nonsuit, and consequently, that the case was improperly stated for the opinion of the Court under the statute. *Aldridge* v. *The Great Western Railway Co.*, 852

DAY OF PAYMENT.

See CALLS, 2, 3, 4, 5.

DEED.

1. By a deed dated in 1630, Sir W. H. and T. H. conveyed to H. L. and H. H. in fee-farm, certain lands in the township of A., "excepting always and reserved out of the grant all mines of coal within the fields and territories of A. aforesaid, together with sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits." The grantors covenanted for themselves, their heirs and assigns, "to give and yield to the said H. L. and H. H., their heirs and assigns, such accustomed recompense for digging and breaking the ground within the fields and territories of A. aforesaid, in which any pit or pits for the getting of coal should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases before." By a similar deed of the same date, the same grantors conveyed lands in the adjoining township of H. to other persons, R. B. and T. P., with similar exception, reservation, and covenant.

Quære, whether this reservation of a sufficient way-leave in 1630 gives a right now to make a *railway*, with cuttings, embankments, and fences, so as to oust the occupier of the soil; but *held*, that it was not to be confined to such ways only as were in use at the time of the grant, and in such a direction as was *then* convenient.

And that a reservation of liberty to sink and dig pits, includes the necessary accessaries (engines, &c.) as incidents thereto:

But that under the reservation in the conveyance of lands in A. the coal owners had no right to carry coals got in H. over lands in A., although from part of the same mineral field.

In an action of trespass for making a railway over the plaintiff's close, the defendant justified under the above reservation of a way-leave: the plaintiff new assigned that the trespasses were committed on other and different occasions, and for other and different purposes, and to a greater extent than was necessary, and in other parts of the close. To this the defendant suffered judgment by default:—*Held*, that on these pleadings it was not competent for the plaintiff to contend that some species of railway was not within the reservation, but that the question was, whether the direction or mode of construction of the railway were authorized by the reservation: that is, such as were reasonably sufficient for the purpose of getting the coal. *Dand* v. *Kingscote*, 27

2. *Held*, that the form of conveyance required by the statute is a *deed*, and that an instrument of transfer executed by the owner of the shares, with a blank for the name of the purchaser, and delivered to the plaintiff, by whom on the sale of them, the name of the purchaser was to be inserted, was void. *Hebblewhite* v. *M'Morine*, 51

3. A canal act (33 Geo. 3, c. ciii, s. 31,) provided, that after land, &c., should be set out for making the intended canal, it should be lawful for all persons seised, or possessed of, or interested in any such land, &c., to contract for, sell, and convey the same to the Company; and that all such contracts should be *inrolled* with the clerk of the peace, &c., and copies thereof be evidence. By sect. 34 commissioners are appointed, (for settling differences between the owners and Company,) who, by sect. 41, by *writing* under their hands and seals, with consent of parties, are to determine and adjust the sum to be paid by the Company for the purchase of such lands, &c., or, in case of refusal or incapacity to treat, &c., to summon a jury to assess the sum to be paid, the verdict of which jury

is to be binding and conclusive on all parties. Sect. 47 provides, that, upon payment of such sum or sums of money as shall be contracted or agreed for between the parties, or determined or adjusted by the commissioners, or assessed by such juries *in manner hereinbefore respectively mentioned*, such lands shall be vested in the Company.

Held, that to vest lands in the Company otherwise than by actual conveyance, there must be payment for lands contracted for in writing, or the price of which was adjusted by the commissioners in writing, or the value found by the jury in writing.

And that proof of payment of purchase-money to the owner for lands, without proof of such contract in writing, is not sufficient evidence of title. *The Earl of Harborough* v. *Shardlow*, 253

4. The London and Brighton Railway Act (1 Vict. c. cxix, s. 140) enacts, that the Company shall enter the names and additions of the shareholders in a book, and cause the common seal to be affixed thereto; and, section 142, that they shall enter in a book the names and places of abode of persons who from time to time shall be entitled to any share in the undertaking; and section 148 provides, that in an action for calls it shall only be necessary to prove that the defendant was a proprietor of the shares, and that notice was given of the calls; and that the production of the *books* above-mentioned shall be *primâ facie* evidence that the defendant is a proprietor.

Held, that the production of the book required by the 140th section, containing the defendant's name, as proprietor of the shares, was alone not sufficient *primâ facie* evidence of his being a proprietor.

Section 155 gives a form of transfer of shares, and provides that on every sale the deed of conveyance (being executed by the seller and purchaser) shall be kept by the Company, who shall enter in a book a memorial of such transfer, and indorse the entry thereof on the said deed, and, until such memorial shall have been made and entered, the seller shall remain liable for calls.

Held, that a deed of transfer of shares to the defendant, which had been first executed by the vendor to J. H. as purchaser, and upon which the purchase-money was paid, which was afterwards altered by having the name of J. H. struck through, and the defendant's inserted, and then re-executed by the vendor without being re-stamped, was void.

Held, also, that the resolution for making calls need not specify a time or place of payment.

And that proof of the entry of the memorial of a transfer-deed, under section 155, is not necessary to enable the Company to recover, the provisions of that section being intended only for the security of the Company. *The London and Brighton Railway Co.* v. *Fairclough*, 544

DEFEAZANCE.

See CONSTRUCTION OF STATUTES, 10.

DEMURRER.

See PLEADING, 3, 5, 9, 13, 14, 16.

DIRECTORS

And "Court of Directors" equivalent. *The Southampton Dock Co.* v. *Richards*, 215

See CALLS, 1, 2, 3.
EVIDENCE, 1.

DIVERSION.

(*Equity.*)

See INJUNCTION, 1.

(*Law.*)

Of watercourse.

See MANDAMUS, 1.

DRAINS.

See CONSTRUCTION OF STATUTES, 2, 3, 8, 12.

DUES.

See RATING.
TONNAGE.

ENGINE.

See DAMAGE, 3.

A contract between a railway Company and a manufacturer, for the supply of locomotive engines, contained the following provisions: "Each engine and tender to be subject to the performance of the distance of one thousand miles, with proper loads, during which trial Messrs. S. & Co. (the manufacturers) are to be liable for any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for, nor liable to the repair of any breakage or damage whatever resulting from collision, neglect, or mismanagement of any of the Company's servants, or any other circumstance, save and except defective materials or workmanship. The performance to which each engine is to be subjected to take place within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & Co. shall forthwith be released from any responsibility in respect of the said engine; the balance to be paid on the satisfactory completion of the trial, and release of Messrs. S. & Co. from further responsibility in respect of each engine." It was also agreed that the fire-boxes should be made of copper 7-16ths of an inch thick, and that the best materials and best workmanship were to be used.

One of the engines so supplied performed the distance of 1000 miles within the month; but some months after the fire-box burst, when it was discovered that the copper was reduced to the thickness of 3-16ths of an inch. (It was admitted that it had originally been of the proper thickness, 7-16ths.)

Held, in an action for the price of the engine, that the defendants could not give evidence of such defect in the copper, no fraud being alleged; and that, by the terms of the contract, the month's trial, having been satisfactory, released the manufacturers from all responsibility in respect of bad materials and bad workmanship. *Sharpe* v. *The Great Western Railway Co.*, 722

ENGINEERS.

In a case where the affidavits on engineering points are conflicting, the Court will seek for the professional assistance of some impartial engineer to form a decision upon them. *Manser* v. *The Northern and Eastern Railway Co.*, 380

ESTOPPEL.

See REPRESENTATION, 1, 2.

EVIDENCE.

(*Equity.*)

See ENGINEERS.

(*Law.*)

See DEED, 3.
ENGINE.
REPRESENTATION, 1, 2.
SHARES.

1. By the Southampton Dock Act, 6 Will. 4, c. xxix, it is provided (sect. 84), that in an action for calls in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the Company is by this act

directed (sect. 89) to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein. Section 89 requires the Company from time to time to cause the names, additions, and places of abode of the persons from time to time entitled to shares, with the number of their shares and amount of subscriptions paid thereon, and the proper number by which every such share shall be distinguished, to be entered in a book to be kept by the secretary.

Held, that the provision as to the making the entries is only directory, and that an omission or irregularity in the entries in the book, relating to other shareholders, does not render the book inadmissible against the defendant, as being the book kept under the act.

And that it is not necessary that the entries should be made by the secretary's hand.

Section 63 directs, that the orders and proceedings of every meeting of the Company shall be entered in a book to be kept for that purpose, and shall be signed by the chairman at such meeting; and when so entered and signed, as also the minutes or entries hereinafter (sect. 75) provided to be kept, shall be deemed original orders and proceedings, and shall be allowed to be read in evidence in all Courts, &c., without proof of such meeting having been duly convened, or of the persons making or entering such orders, &c. being proprietors or directors of the Company. Section 75 provides that the directors shall keep a regular minute and entry of the orders and proceedings at every meeting of directors, which shall be signed by the chairman at each respective meeting. *Held*, that the signature of the minutes by the chairman of the meeting, when presiding at the subsequent meeting, is sufficient.

And that the terms "directors," and "court of directors," are equivalent, so that the calls may be made by a court of directors, and a general meeting is not necessary for that purpose. *The Southampton Dock Co.* v. *Richards*, 215

2. *Quære*, under what circumstances proprietors, who have parted with their shares for the purpose of giving evidence for the Company, can become competent witnesses. *Bell* v. *The Hull and Selby Railway Co.*, 279

3. By the London Grand Junction Railway Act (6 & 7 Will. 4, c. civ,) the Company are required (s. 145) "to cause the names and additions of the several persons who shall then be or shall thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made to cause their common seal to be affixed thereto." By sect. 147 it is enacted, "that the Company shall, in some proper book to be provided by them for that purpose, enter and keep a true account of the places of abode of the several proprietors of the undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein." And sect. 152 enacts, "that, in any action to be brought by the Company against any proprietor for the time being of any share in the said undertaking to recover any money due and payable for or in respect of any call, in order

to prove that the defendant, at the time of making such call, was a proprietor of such share as alleged, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein :"—*Held*, that the book thus made evidence by sect. 152 is the book which the Company are required by sect. 145 to keep.

And that a book kept by the Company, containing the names and additions of all the persons whom they supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscriptions paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the Company—was a book substantially kept in compliance with the act, and admissible in evidence, though it contained names of persons not entitled, and omitted some of persons who were entitled to shares, and some entries to which there was no seal affixed.

Held also, that the *primâ facie* evidence of the defendant being a proprietor, supplied by the production of this book, was not rebutted by proof that another person was the original subscriber to the parliamentary contract in respect of the shares in question, and had not conveyed them to the defendant by deed, as required by sect. 155 ; and therefore that the defendant, who having before the passing of the act become entitled by the then well-understood mode of transfer (in the form of scrip) was afterwards registered as a shareholder, was liable to pay calls on such shares. *The London Grand Junction Railway Co.* v. *Freeman*, 468

4. A letter written by the contractor, in which he stated that he was absent from home, to avoid two writs, *held* admissible evidence of an act of bankruptcy on the day of the date, although there was no other evidence of the writs being issued or other pressure by creditors. *Rouch* v. *The Great Western Railway Co.*, 505

5. On the 20th of February, 1838, a contract was entered into (through brokers) by the plaintiff to sell, and the defendant to buy, thirty railway shares, at £— per share, no time being specified for the completion of the purchase. On the 3rd of March the defendant wrote to the plaintiff's brokers requesting them to dispatch the 30 shares forthwith, which they accordingly did the same day, with a transfer *in blank*, and the purchase-money was paid. The shares not being registered in the defendant's name, the plaintiff, still continuing the apparent owner, was compelled to pay the calls which were subsequently made on the shares. In an action against the defendant for not indemnifying the plaintiff from such liabilities :—*Held*, that, under these circumstances, there was no undertaking implied by law to indemnify against subsequent calls, nor any evidence of such an undertaking in point of fact.

Held, also, that there was sufficient evidence to support the averment in the declaration, that " the plaintiff hath always, from the time of the sale of the shares and making the promise hitherto, been ready and willing to transfer the shares to the defendant

according to the terms of the said contract:" but that if it had been necessary, in order to support this allegation, to prove the tender of a valid conveyance, the above evidence would not have been sufficient. *Humble* v. *Langston*, 533

6. The London and Brighton Railway Act (1 Vict. c. cxix, s. 140) enacts, that the Company shall enter the names and additions of the shareholders in a book, and cause the common seal to be affixed thereto; and, sect. 142, that they shall enter in a book the names and places of abode of persons who from time to time shall be entitled to any share in the undertaking; and sect. 148 provides, that in an action for calls it shall only be necessary to prove that the defendant was a proprietor of the shares, and that notice was given of the calls; and that the production of the *books* above-mentioned shall be *primâ facie* evidence that the defendant is a proprietor.

Held, that the production of the book required by the 140th section, containing the defendant's name, as proprietor of the shares, was alone not sufficient *primâ facie* evidence of his being a proprietor.

And that proof of the entry of the memorial of a transfer-deed, under sect. 155, is not necessary to enable the Company to recover, the provisions of that section being intended only for the security of the Company. *The London and Brighton Railway Co.* v. *Fairclough*, 544

7. In an action for not accepting railway shares sold at Liverpool to be delivered in a reasonable time, a rule of the Liverpool Stock Exchange acted upon by all the Liverpool brokers, and seen by the defendant, "that the seller of shares is, in all cases, entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he is made acquainted with the name of his transferee," was held admissible as evidence of the reasonableness of the time for completing the contract, on an issue as to the plaintiff's being ready and willing to do so. *Stewart* v. *Cauty*, 616

8. By a railway act (6 Will. 4, c. lxxxvii, s. 101) it was provided, that proprietors might transfer their shares on certain conditions; that the deed of transfer should be kept by the Company, who were to cause a memorial of such transfer to be entered in a book to be kept for that purpose. Sect. 96 gave power to make calls, on giving 21 days' notice, and provided, that if any owner or proprietor *for the time being* should not pay his calls, he should be liable to pay interest; and sect. 98 provided, that on the trial it should be only necessary to prove that the defendant, *at the time of making such calls*, was a proprietor.

An action was brought by the Company against the defendant for two calls, notice of the first having been given 6th March, payable 9th April, and of the second 23rd June, payable 28th July. A deed of transfer of the shares from the original holder to the defendant was produced, and the transfer book of the Company, containing a memorial of the transfer, both dated 7th April, but there was no other evidence of the time when the entry was made:—

Held, that the transfer book was admissible, and was reasonable evidence to shew the entry was made when it bore date; and that the defendant, not having been a proprietor till 7th April, after the day when the first call was *made* (not *payable*), was not liable to the first, but only to the second call. *The Aylesbury Railway Co.* v. *Thompson*, 668

EXECUTION.

See DEED, 2, 4.

EXPENSES OF WITNESSES.

See COSTS, 3.

EXPORTATION.

See PORT.

FEIGNED ISSUE.

See COMPENSATION, 5.

FENCES OF ROAD,

Repair of, pending rule for mandamus.

See MANDAMUS, 5.

FORFEITURE.

See BANKRUPT.
PLEADING, 1, 5, 6, 7.
SHARES, 12, 13, 14.

FORM OF CONVEYANCE.

See DEED, 2, 4.

FRAUDS (STATUTE OF.)

Shares in a Company are not an interest in land, nor "goods, wares, and merchandize," within the 17th section of the Statute of Frauds, (29 Car. 2, c. 3), and therefore a contract for the sale of such shares is not required to be by note in writing, &c., as provided in cases within the said section.

Semble, there is a distinction between these words of the Statute of Frauds, and the words "goods and chattels," used in the Bankrupt Act (6 Geo. 4, c. 16, s. 72). *Humble* v. *Mitchell*, 70

GRANT.

See DEED, 1.

HOUSE.

See COMPENSATION, 1.
DAMAGE, 2.
MANDAMUS, 4.

INCLINED PLANE.

See TONNAGE.

INCORPORATION (NAME OF).

The Court quashed a coroner's inquisition, which described the engine and carriage moving to the death, as the goods and chattels, and in possession of "The Proprietors of the Hull and Selby Railway," that not being their name of incorporation. *Regina* v. *West*, 613

INDEMNITY (IMPLIED).

See CALLS, 6.

INFANT.

See SPECIFIC PERFORMANCE.

INJUNCTION.

See CONSTRUCTION OF STATUTES, 3.

1. A Railway Company made excavations upon their own land, the purpose of which was the partial diversion of the stream of water of a navigable river, and the works so prosecuted necessarily occasioned the obstruction of a private road. The plaintiffs, who were the owners of a fulling mill, which was supplied with water from the river, alleged that the proposed diversion of the stream was illegal under the powers of the act. The plaintiffs, who had a right of way over the private road, also alleged that the Company were interfering with the road without the performance of the conditions imposed by the Railway Act as preliminary to interfering with the road.

Held, that although the Company were working on their own land, the plaintiffs must be held to have had

notice of the intended works of the Company, and had by an acquiescence for 18 months, during which the Company had expended a large sum of money on the works, precluded themselves from asking for the interposition of this Court by injunction.

Semble, the plaintiffs, although interested by the situation of their property or the nature of their business in preserving open the navigation of the river Calder, but not otherwise interested in the navigation, were not entitled to sustain a suit to enforce clauses in the Railway Acts protecting the Calder navigation from injury by the Railway works. *Illingworth* v. *The Manchester and Leeds Railway Co.*, 187

2. An injunction will be granted at the suit of one tenant in common to restrain a co-tenant from dealing with the common property, where the act sought to be restrained amounts to a destruction of the property. But where five out of six tenants in common of a property under lease at an annual rent of £30 per annum, had granted a renewed lease to a railway company at an improved rent of £90, and the other co-tenant refusing to concur in such lease had recovered judgment in ejectment against the lessees, the Court refused to interfere by injunction to restrain that co-tenant from proceeding to remove iron rails laid down by the lessees. *The Durham and Sunderland Railway Co.* v. *Wawn*, 395

3. A clause in a railway act enacted, "That it shall not be lawful for the Company to make or establish any public station, yards, wharfs, waiting, loading or unloading places, warehouses, or other buildings and conveniences for the depositing, receiving, loading or keeping any passengers or cattle, or any goods, articles, matters or things, upon the estate of R. G., his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said R. G., his heirs or assigns, for that purpose had and obtained." R. G. filed a bill to restrain the Company from using an engine-house and other buildings erected by them within the prescribed limits:—*Held*, on demurrer, that the word "public," did not necessarily override the whole sentence; and that if it did, every thing connected with the railway must be considered as for the public use.

The injunction in this case was granted, but with liberty to use the erection as theretofore, upon their undertaking to erect no more, and to apply for a rehearing, or to prosecute an appeal to the House of Lords. *Gordon* v. *The Cheltenham and Great Western Railway Co.*, 800 & 872

4. The defendants, not being possessed of compulsory powers for taking land for the purposes of a railway, and it being necessary for them in order to complete their line, to cross the plaintiff's railway, gave notice of their intention of crossing the same, but were restrained by injunction from so doing until the question of right could be decided at law. They had entered into a contract with an owner of land on one side of the plaintiff's railway, by which a way-leave was to be granted if the line were completed within a certain time: but this injunction would render it impossible for them to complete their contract:—*Held*, that the injunction should be dissolved so far as to enable the defendants to complete their contract.

Semble, where the construction of an act of Parliament is doubtful, the Court will send the question to a court of law; in the meantime granting, continuing, or dissolving the injunction (as the case may be) in fa-

vour of the party who will sustain the greater injury.

Semble, that Companies have a right to carry on their railway according to the plan laid down in their act, although a junction contemplated in procuring such act, may be frustrated by the abandonment of the line with which it was the original intention of the Company to unite. *The Clarence Railway Co.* v. *The Great North of England, Clarence, and Hartlepool Junction Railway Co.*, 763

5. An injunction, which had been granted to restrain the trustees of the road from removing the stone blocks, was dissolved, although in the opinion of the Court no damage could result from the stone blocks, either to the road or the passengers upon it. *The London and Brighton Railway Co.* v. *Cooper*, 312

INJURY.

(*Equity.*)

The Court will not consider mere inconvenience in the light of injury. *The Clarence Railway Co.* v. *The Great North of England, Clarence, and Hartlepool Junction Railway Co.*, 763

(*Law.*)

See COMPENSATION.
DAMAGE.
MANDAMUS, 1, 4, 5, 6, 7.
PRECAUTION.

INQUISITION.

See COMPENSATION.
CORONER.

INROLMENT.

See DEED, 3.

INSPECTION.

See BOOKS OF COMPANY.

INTEREST

Recoverable without a count for it.

The Southampton Dock Co. v. *Richards*, 215

INTEREST (IN LAND).

See FRAUDS, STATUTE OF.

INTERRUPTION.

See BRIDGE, 1.

JOINT STOCK COMPANY.

See SHARES.
SUBSCRIBERS.

JURISDICTION (PLEA TO).

By a Railway Act (1 Vict. c. xcv, s. 75), it is enacted, that in case any owner of a share shall neglect or refuse to pay the calls upon it, it shall be lawful for the Company to sue for and recover the same in any of her Majesty's Courts of Record in Dublin; and sect. 77 gives a concise form of declaration, "that the defendant is indebted for calls, &c." without setting forth the special matter.

To a declaration under the latter section in an action for calls brought in England, the defendant pleaded "that this Court ought not to take further cognizance of the action, because it is enacted by the said statute (sect. 75), that in an action for calls, it shall be lawful for the said Company to sue for and recover the same in any of her Majesty's Courts of Record in Dublin, and that he was therefore liable to be sued in those Courts, *and not elsewhere;* and this the defendant is ready to verify; therefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid."

Held, on demurrer to this plea, that although in form a plea to the justification, yet as it disclosed matters in bar of the action, it might be made use of for that purpose; and that therefore the declaration was open to the objection of being bad at common law.

And that the plaintiffs not having followed the remedy given by the act, could not avail themselves of the concise form of declaring given by that act. *The Dundalk Western Railway Co.* v. *Tapster*, 586

JURY.

See COMPENSATION.
COSTS, 3.
MANDAMUS, 1, 6, 7.

LACHES.

See INJUNCTION, 1.
INTEREST.

LANDOWNER.

See COMMUNICATION.

LEASE.

See INJUNCTION.

LEVEL (CROSSING AT A).

See TURNPIKE ROAD.

LIABILITY.

See SHARES, 1.
SUBSCRIBERS, 1, 2.
VENDOR AND PURCHASER, 1.

LIEN.

See BANKRUPT.

LINE OF RAILWAY.

1. By the Bristol and Exeter Railway Act (6 & 7 Will. 4, c. xxxvi, s. 25), it was enacted, that, if any person should, for twenty-one days after notice in writing, neglect or refuse to treat, or not agree with the Company for the sale of his estate or interest in land required by them for the purposes of the act, they might issue their warrant to the sheriff of the county to summon a jury, to assess the sum to be paid for the purchase of such lands; and that fourteen days' notice of the time and place at which such jury was summoned, should also be given to him. Sect. 242 provided, that the whole capital (£1,500,000) should be subscribed before any of the powers of the act, as to the compulsory taking of land, should be put in force. An inquisition taken under sect. 25, recited, that notice in writing had been duly given to C. H. P. by the Company, that his land was required; and that he had not within twenty-one days after such notice agreed with them for the sale thereof, and that fourteen days' notice of the time and place of holding such inquisition had also been given to him. The land being afterwards taken by the Company under the act, and an action of ejectment brought by C. H. P. for their recovery:—

Held, that the inquisition set out in form sufficient to give the sheriff jurisdiction, and that the proviso of sect. 242, being in substance a defeazance of the compulsory powers of the act, need not be set out, but should come by way of answer from C. H. P.

By sect. 57, the lands to be taken for the *line* of the railway are not to exceed twenty-two yards in breadth, except in places required (*inter alia*)

for embankments and cuttings; and section 59 (which gives the power to deviate in the *line* and *section*) limits the *deviation from the line delineated* on the plan deposited with the clerk of the peace *to* 100 *yards*, and provides that it shall not *extend into the lands* of any person not mentioned in the book of reference, unless omitted by mistake, and so certified.

Held, that the same powers were incidental to the deviated as to the original line, and that therefore the Company were not limited to 100 yards in those places in the deviation required for embankments and cuttings, but only in the actual line of the railway.

And that it was not competent to C. H. P. to object that lands of K., not mentioned in the book of reference, were taken for such purpose.

And that the line or centre, from which measurements are to be made, is the *medium filum* of the twenty-two yards of land to be taken, and not of the space between the two rails. *Doe* d. *Payne* v. *The Bristol and Exeter Railway Co.*, 75

2. By the Bristol and Exeter Railway Act (6 Will. 4, c. xxxvi, ss. 5 & 7), it was provided, "that the Company should make the railway and other works, by the said act authorized, on or through the lands delineated on the maps or plans, and described in the book of reference deposited with the clerk of the peace, unless where land had been omitted by mistake, and such mistake certified by two justices."

By sect. 59, "that the Company, in making the said railway, &c., should not deviate more than 100 yards from the line delineated in the map;"

By section 25, "that when damage done to a mansion was the subject of inquiry, such question should be tried by a special jury;"

And by section 235, it was enacted, "that no proceedings had or taken in pursuance of the act should be removed by *certiorari*."

The Company were said to have exceeded their power in three instances: —1st, by making the railway through a piece of land, not included in the plan or book of reference, and not certified to have been omitted by mistake; 2ndly, by deviating more than 100 yards from the line delineated; 3rdly, the inquisition related to damage done to a mansion, and did not purport to have been taken by a special jury.

Held, that the proper remedy for this excess of jurisdiction was by action of trespass, and the Court refused to grant a *certiorari*. *Regina* v. *The Bristol and Exeter Railway Co.*, 99

LOCKS.

See RATING, 1.

MANDAMUS.

1. Under a Railway Act, which gave power to *divert* rivers, watercourses, &c., a Company had raised the level of a brook, into which the sough of a coal mine had been accustomed to empty itself, and thereby caused the water of the brook to flow into the sough, and inundate and stop the coal-works: upon the owner of them applying for a *mandamus* for a jury to *ascertain* and compensate him for the injury done to his works by such diverting of the brook, which was opposed by the Company on the ground, that on the claimant's remonstrance they had restored the brook to its former level, and that no damage had been done by the alteration, such stoppages having been frequently caused by floods before:—

Held, that it was a question for a jury to ascertain whether any damage had been done to the claimant, and that his alleging that he was injured by the diverting (i. e. altering the level) of the brook, was sufficient to induce the Court to grant a *mandamus*.

And that if damage be done partly under the powers of a statute and partly not, a *mandamus* and not an action at law is the proper remedy for such lawful acts.

After the sufficiency of a return to a *mandamus* has been decided on concilium, any material fact in it may be traversed. *Regina* v. *The North Midland Railway Co.*, 1

2. A *mandamus* was issued to a Railway Company, (who had obtained an act for making a railway from London to Norwich and Yarmouth, but had only purchased lands and commenced works on a part of the line, viz. from London to Colchester, and it appeared doubtful whether they intended to proceed further), suggesting that the Company had been required to set out and define any proposed deviations from the original line, and to proceed to make and complete the railway from London to Norwich and Yarmouth, but that they had absolutely refused and neglected to purchase the lands necessary to the making between Colchester and Norwich, and Norwich and Yarmouth, or to set out and define the deviations, or to make and complete the railway. There was no averment that the Company had given up their design, or had wilfully exercised any injurious option in taking land, or were not proceeding with all convenient speed, or that a reasonable time had elapsed without due preparations being made, or that it would not be more advantageous to abide by the original line, than to set out and define a different one.

Held, that the *mandamus* was insufficient. *Regina* v. *The Eastern Counties Railway Co.*, 260

3. An Act of Parliament (43 Geo. 3, c. 140) authorized a Dock Company to make, complete, and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and of equal inclination at the sides with the old course or channel (taken by them for the purposes of their navigation).

Held, that a duty was thereby cast upon the Company generally to repair the banks of the new channel.

And that *mandamus* would lie to compel them to repair, though they might also be liable to indictment.

A *mandamus* having issued to compel the Company to repair and maintain the banks, they returned that they were not required by the said statute, nor were otherwise liable to repair the banks; and that, as near as circumstances permitted, they had maintained the said new course or channel of equal depth and breadth at the bottom, and of equal inclination of the sides with the old course or channel:—*Held*, an insufficient return. *Regina* v. *The Bristol Dock Co.*, 599

4. By a Railway Act (6 Will. 4, c. xiv, s. 29) a Company were empowered, subject to the provisions and restrictions of the said act, to make or construct, upon, across, under, or over the railway, such roads as the said Company should think proper.

By sect. 41, when any part of any road, either public or private, should be cut through, raised, sunk, taken, or so much injured by the Company as to be impassable or inconvenient, the Company, before any such road should be so cut through, raised, &c., were to cause another road to be set out and made instead thereof, as con-

venient as the said road so cut through, raised, &c., or as near thereto as might be; and where the road cut through, raised, &c. should be a turnpike road, the substituted road, if temporary, was to be set out and made, and the principal road restored within six months after commencing the operation.

By sect. 47, where any bridge should be erected for carrying any turnpike-road, public highway, or occupation road over the railway, the road over such bridge was not to be less than fifteen feet.

A *mandamus*, reciting that the Company had, in November, 1838, (after the compulsory powers given to the Company for taking land had expired), cut through and taken part of a turnpike road, 40 feet wide, and had made a bridge thereon for carrying it over the railway, the said bridge and the approaches (which were about 150 yards in length on each side of the bridge) being about 30 feet wide only, commanded the Company to restore the turnpike road according to the said act.

The Company returned, 1. That they had not "cut through and taken" the said part of the turnpike road within the meaning of the act. 2. That they had judged it necessary to erect the bridge to carry the road over the railway, and had made the bridge of a greater width than was required by the act. 3. That it was necessary, in consequence of the erection of such bridge, to make approaches also, and that they had made the approaches *as convenient to the public* as they could be made, in execution of the powers of the act, and as the original road had been. 4. That they were not authorized to injure any house, unless specified in the schedule of the act, or omitted by mistake, without consent; and that they could not obey the writ without injuring houses neither so specified nor omitted by mistake. 5. That they could not obey the writ without taking more land, and that their compulsory powers to take land had expired before they were required by the trustees of the road to widen it:—

Held, 1. That sect. 41 was not confined to the case of a turnpike road becoming impassable by the works of the Company, and of a temporary road substituted during such interruption; but that they had "taken" the road in question within the meaning of that section. 2. That the return was bad; and a peremptory *mandamus* was issued, commanding the Company to restore the road to its former width.

Held also, that the *minimum* of 15 feet is confined to the bridge itself, and does not apply to the approaches. *Regina* v. *The Birmingham and Gloucester Railway Co.*, 694

5. A rule having been obtained to enlarge the time for shewing cause to a rule for a *mandamus*, the Court opened the rule, and imposed the following terms:—That the Company should repair the fences on each side of the road, to the satisfaction of two justices, one to be chosen by each party, and they to choose a third, if necessary; and in case the rule for a *mandamus* should be discharged, the trustees of the road should pay the costs of repairing the fences. *Regina* v. *The Birmingham and Gloucester Railway Co.*, 710

6. By a Railway Act (6 & 7 Will. 4, c. cxl, s. 94) a Company were empowered generally to divert, raise, sink, or deepen any roads, in order to carry the same over, under, or by the side of the railway, subject to the provisions and restrictions of the said act. By another act (7 Will. 4, c. xxiv, enabling them to vary their line) they were authorized (s. 38) to

carry the line of railway across a certain turnpike road, by means of a bridge of the width of 30 feet at the least, and for that purpose to lower the then present bed of the road, but in so doing, were required to leave a certain inclination on each side of the bridge, and headway under it, and to relay and *reform* the road.

The Company made a bridge 30 feet wide, over a turnpike road 42 feet wide, consisting of 30 feet carriage way and two footways of 6 feet each. They lowered the carriage way of the road, but left the footways at their original level.

On the trial of certain traverses to a return to a *mandamus* which had issued to the Company to reform the road, and to lower it the whole width of 42 feet, the jury found—1. That the Company had not so lowered the road. 2. That they had *reformed* the road, in compliance with the act. 3. That the road so made by the company *was more commodious to the public*, than if the whole road had been lowered to the full width of 42 feet.

Held, that the word "road" meant the whole road, including footpaths: and, therefore, that the Company had not *reformed* the road as required by the act.

And, that the finding of the jury upon the last issue, as to its being *more commodious*, was not sufficient to dispense with a compliance with the language and meaning of the act. *Regina* v. *The Manchester and Leeds Railway Co.*, 711

7. By a Railway Act (6 & 7 Will. 4, c. cvi,) a Company were empowered (s. 9), *inter alia*, "to raise or lower certain roads or ways, in order the more conveniently to carry the same over, or under, or by the side of the railway, doing as little damage as may be in the execution of the powers hereby granted, and making full satisfaction *in manner hereinafter mentioned*, to all persons interested in any lands which shall be taken, used, or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted." Sect. 26 provides, "That the owners or occupiers of any lands, through, over, or upon which the railway is intended to be made, may agree to accept satisfaction for the value of such lands, and also compensation for any damage by them sustained by reason of the severing or dividing of such lands." And by sect. 29, "*if any of the parties entitled to receive such purchase-money, satisfaction, recompense, or compensation as aforesaid*, shall refuse to accept such purchase-money, &c., as is offered by the Company, or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands cannot be made," a jury is to be summoned to assess the purchase-money; "and also the sum of money to be paid by way of satisfaction, recompense, and compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands."

The Company had lowered a road in front of a piece of land, and thereby injured its value, by impeding the access to it, and causing the necessity of additional fences, &c., but they had not actually touched any part of the land.

Held, that the words of the 29th section do not necessarily refer to the persons mentioned in the 28th section alone, but may apply to and include cases mentioned in the 9th section, and that the Company were bound to issue their warrant, to summon a jury to make compensation for the damage to the land in question.

Semble, that the *mandamus* should state *specifically* the nature and cause of the injury complained of, and not in the general words of the act. And the Court allowed the writ to be amended accordingly. *Regina* v. *The Eastern Counties Railway Co.*, 736

MANSION.

See COMPENSATION, 1.

MAP (LINE DELINEATED IN).

See COMPENSATION, 1.

MATERIALS.

See BANKRUPT.

MAXIMUM AND MINIMUM.

See MANDAMUS, 4.

MEDIUM FILUM VIÆ.

See LINE OF RAILWAY.

MEETINGS OF COMPANY.

See CALLS, 1, 3.
SHARES.

MEMORIAL (OF TRANSFER).

See DEED, 4.

MINES.

See COMPENSATION, 5.
DEED, 1.

MINUTES OF MEETING.

See CALLS, 1, 3.

MONOPOLY.

The Birmingham and Derby Junction Railway commencing at Derby, communicates with the London and Birmingham Railway at Hampton-in-Arden. The Midland Counties' Railway forms a communication between Derby and the London and Birmingham Railway at Rugby.

The Birmingham and Derby Railway Act empowers that Company to receive from passengers conveyed by the Company's carriages, tolls not exceeding a specified amount.

A subsequent act, for authorizing an alteration in the line of the railway, provides, that the charges by the first act authorized to be made for the carriage of passengers, goods, or other matters or things, shall be at all times charged equally and after the same rate per ton per mile, in respect to all passengers and goods of a like description, and conveyed or propelled by a like carriage or engine, passing on the same portion of the line only, and under the same circumstances, and that no reduction or advance in any charge for conveyance by the Company, or for the use of any locomotive power to be supplied by them, shall be made either directly or indirectly, in favour of or against any particular company or person travelling upon or using the same portion of the railway under the same circumstances.

After the opening of the Midland Counties Railway, the Birmingham and Derby Junction Railway Company charged passengers conveyed by their carriages from Derby to Hampton-in-Arden, 8*s*., while they charged other passengers proceeding from Derby to Hampton-in-Arden, and thence to London, only after the rate of 2*s*. between Derby and Hampton-in-Arden.

An information was filed, praying an injunction to restrain the imposition of an unequal charge between the termini at Derby and Hampton. It

was admitted by the information that the charge of 8*s.* did not exceed the rate allowed by the act.

Held, by the Lord Chancellor on a motion for an injunction, that the clause above set forth was only meant to prevent the exercise of a monopoly to the prejudice of one passenger or carrier and in favour of another. That, even if this Court had jurisdiction in such a case, it would not interfere, unless it were clear that the public interest required it; and that in this case, it being admitted that the higher charge was not more than the act permitted, it did not appear that the public were prejudiced by the arrangement. The motion was refused with costs. *Att.-Gen. v. The Birmingham and Derby Junction Railway Co.*, 124

MORTGAGE.

By a Railway Act, (11 Geo. 4, c. lxi, s. 75), a Company were empowered to borrow money on the credit of the undertaking, and to "assign and charge the property of the undertaking, and the rates and tolls as a security for the money borrowed." The clause contained a form of mortgage, assigning to A. B., his executors, administrators, and assigns, the said undertaking, and all and singular the rates, tolls, and other sums arising by virtue of the act, and all the estate, right, title, and interest, of, in, and to the same.

Held, in ejectment brought by a mortgagee, that the land of the Company was not included in the mortgage under the word "undertaking," and did not pass by such mortgage. *Doe* d. *Myatt* v. *The St. Helen's and Runcorn Gap Railway Co.*, 756

NAVIGATION.

See BRIDGE, 1.
DAMAGE, 1.
MANDAMUS, 1, 3.
RATING, 1, 2.

NEGLIGENCE.

See DAMAGE, 2, 3.
PRECAUTION.

NEW ASSIGNMENT.

See PLEADING, 8.

NOTICE.

See CALLS, 2, 4.
FORFEITURE.
PLEADING, 1, 5, 6.
SHARES, 11, 14.

NUNQUAM INDEBITATUS.

What it puts in issue.

See PLEADING, 5, 6, 15.

OPTION OF FORFEITURE OR ACTION.

See SHARES, 12, 13.

OWNER.

See COMMUNICATION.
SUBSCRIBERS.

OWNERSHIP

Of thing moving to the Death.

See CORONER.

PARLIAMENTARY CONTRACT.

See CONTRACT.

PAVEMENT.

See COMMISSIONERS OF PAVING.

PAYMENT (OF COMPENSATION MONEY).

The 6 & 7 Will. 4, c. xxxvi, s. 47, provided that the Company, on payment of such sum as *should have been* awarded by the jury to the owner (or, in case of his neglect or refusal to convey, into the Bank of England), might enter upon and take the lands. That act expired *May 9th*, 1838; but by the 1 Vict. c. xxvi, s. 1, which came into operation *June 12th*, all its powers and authorities were revived. Section 2 repealed that 47th section. Section 12 *revived* the time for taking lands, and extended it to three years from the expiration of the two limited by the former act; and sect. 14 re-enacted sect. 47 in terms. An inquisition was taken under the 6 & 7 Will. 4, and an order made *June the 11th* for the payment of the purchase-money into the Bank; and on *June the 21st* (C. H. P. not having offered to convey) the money was paid in accordingly.

Held, that the 1 Vict. c. xxvi, enabled the Company to act upon and to complete the proceedings of the inquisition taken under 6 & 7 Will. 4, c. xxxvi. *Doe* d. *Payne* v. *The Bristol and Exeter Railway Co.*, 75

PAYMENT.

Time, place, and person of.

See CALLS.

PAYMENT (INTO COURT).

See VENDORS AND PURCHASERS, 2.

PERMANENT WORKS.

See BANKRUPT, 1.
BRIDGE.

PLAINTIFF.

Who to be, in inquisitions to assess damages. *Regina* v. *The Sheriff of Warwickshire*, 661

PLEADING.

(*Equity.*)

1. *Held*, that a suit for restraining the directors from declaring the plaintiff's shares forfeited was well framed by the plaintiff on behalf of himself and all other the members not defendants, against those parties as defendants who had subscribed for the additional shares. *Preston* v. *The Grand Collier Dock Co.*, 335

(*Law.*)

2. In an action of trespass for making a railway over the plaintiff's close, the defendant justified under the reservation of a way-leave: the plaintiff new assigned that the trespasses were committed on other and different occasions, and for other and different purposes, and to a greater extent than was necessary, and in other parts of the close. To this the defendant suffered judgment by default:—*Held*, that on these pleadings it was not competent for the plaintiff to contend that some species of railway was not within the reservation, but that the question was, whether the direction or mode of construction of the railway were authorized by the reservation; that is, such as were reasonably sufficient for the purpose of getting the coal. *Dand* v. *Kingscote*, 27

3. The London and Brighton Railway Act (1 Vict. c. cxix, s. 155) provides, that the form of conveyance of shares shall be by writing, duly stamped, under the hands and seals of the parties, and that on every sale the *deed* or *conveyance* shall be kept by the Company, and an entry of the memorial of such transfers and sale shall be indorsed on the said *deed* of sale or transfer. Section 157 provides against any transfer of shares till all the calls on them are paid.

The plaintiff in September, having agreed to sell to the defendant fifty shares to be delivered on the 1st of March, bought of R. W. P. (through brokers) fifty shares to be delivered on the 15th of December next, on which day R. W. P. delivered to him fifty certificates and three transfers for shares with blanks for the purchaser's name, the consideration, and the date. On the 1st of March the plaintiff tendered these certificates and transfers to the defendant, who refused to accept them; at that time there were some calls due, but that objection was waived.

To an action brought to recover the difference of price between December and March, the defendant pleaded (amongst others) 1. That the plaintiff was not ready to transfer the fifty shares to him, nor offered to execute to him or his nominee *a legal transfer* of them. 2. That the plaintiff was not at the time of the agreement the proprietor of the fifty shares, and had no good right or title to execute a legal transfer of them. 3. That, at the time of the said contract, the plaintiff was not possessed of or entitled to, nor had entered into any contract for the purchase of, nor had any reasonable expectation of becoming possessed of or entitled to, any such shares, otherwise than by afterwards purchasing them. (This last plea was held bad on general demurrer).

Held, that the form of conveyance required by the statute is a *deed*, and that an instrument of transfer executed by the owner of the shares, with a blank for the name of the purchaser, and delivered to the plaintiff, by whom, on the sale of them, the name of the purchaser was to be inserted, was void; *and* that the non-payment of the calls would have been a valid objection, but that a waiver of it by parol was sufficient to remove it.

Semble, that the plaintiff could not give the defendant an implied covenant for title, R. W. P. being the actual owner of the shares. *Hebblewhite* v. *M'Morine*, 51

4. The 84th section giving the form of declarations for calls, and the proofs necessary, provides that the Company shall recover what shall appear due, *including interest at £5 per cent.*:—*Held*, that it is not necessary to insert a count for interest, which may be added by the jury to the debt claimed for the calls. *The Southampton Dock Co.* v. *Richards*, 215

5. To an action of debt for calls (the declaration being in the general form given by section 50) the defendant pleaded—1st. That he was not nor is indebted *modo et formâ*, &c. 2nd. That no notice of the calls was given as required by the act. 3rd. That the directors did not appoint any time, manner, or bank for payment. 4th. That the defendant, having neglected to pay his calls, the said shares were declared by the directors to be forfeited, and the said directors then exercised and declared their option that the same should be, and they were, forfeited; of which the defendant had due notice, and acquiesced therein. 5th. That the action was commenced after sale of the shares by the defendant, without his having paid the calls thereon, whereby the shares became forfeited, of which the plaintiffs had notice, and the said forfeiture

was duly ratified and declared in the manner directed by the act. The four last pleas concluded with a verification. Special demurrer to the four.

Held, that the allegation of notice, being one of the facts required by the act to be proved by the plaintiffs, must be taken to be impliedly contained in the declaration; and, therefore, that the 2nd and 3rd pleas were bad for not concluding to the country, being a denial of a fact so impliedly averred.

And that the 4th and 5th pleas were bad for not shewing that the shares were declared forfeited at a general or special meeting of the Company, as provided by the act.

Semble, that the plea of *nunquàm indebitatus* puts in issue all the matters required by the statute to be proved by the plaintiffs in such action. *The Edinburgh, Leith, and Newhaven Railway Co.* v. *Hebblewhite*, 237

6. In an action for calls under the South Eastern Railway Act, (6 Will. 4, c. lxxv), the Court refused to allow the defendant to plead—1. That there were not a competent number of directors present when the calls were made; 2. That no notice of the calls; 3. Or of the time, or place, or person, for payment thereof was given; 4. That the calls were not made for the expenses of the undertaking, and not necessary for the purposes of the act; 5. Not made upon all the subscribers and proprietors; 9. Nor by competent persons, and for the sole purpose of the undertaking:—but confined them to the pleas of—1. *Nunquàm indebitatus*; 2. Defendant not a proprietor; and 3. That the directors had exercised their option in declaring the shares to be forfeited, and had taken the steps thereon directed by the act. *The South Eastern Railway Co.* v. *Hebblewhite*, 247

7. The Court refused to rescind a Judge's order, which gave leave to the defendant to plead (*inter alia*), that, before the calls were made, the directors declared the shares forfeited; but did not go on to say that the declaration of forfeiture had been confirmed by the Company. *The Eastern Counties Railway Co.* v. *Fairclough*, 250

8. Where, in trover, the defendant justifies under a right to use the goods for a particular purpose, and within a particular locality, and he has used them in a different manner or locality, the plaintiff should new-assign. *Hawthorn* v. *The Newcastle-on-Tyne and North Shields Railway Co.*, 288

9. The declaration stated that the plaintiff was possessed of a certain house, situate &c., and that the defendants (a Railway Company) were making a railway and excavations, &c., near thereto, and to a certain other house, whereupon it was their duty to take proper precaution in making the said railway, &c. But that the defendants, not regarding their duty, did not take, &c., but so carelessly, &c., proceeded in the works, without taking proper precaution to prevent the house near the house of the plaintiff from falling against the plaintiff's; that for want of due precaution on the occasion aforesaid, the said house near the house of the plaintiff gave way and fell against it, whereby, &c.:—*Held*, on general demurrer, that the breach contained a sufficient allegation of the injury to the plaintiff having been caused by the negligence of the defendants.

Precaution here is equivalent to *care* and *skill*. *Davis* v. *The London and Blackwall Railway Co.*, 308

10. In an action by a Railway Company for calls, the declaration stated that the defendant subscribed for a sum of money, to wit, &c., towards the undertaking, and for certain shares therein. In the 195th section of their

act it was recited, that part of the capital authorized (by section 1) to be raised, had been subscribed for by several persons "under a contract, binding themselves, their *heirs*, &c." On motion in arrest of judgment, on the ground that the declaration should have alleged the subscription to have been by deed:—*Held*, that the declaration was sufficient after (and *semble* before) verdict.

Semble, also, that in an action against an original subscriber, the Company need not declare specially on the deed executed before the passing of the act, and that a deed is not necessary in the case of subsequent subscribers. *The Great North of England Railway Co.* v. *Biddulph*, 401

11. Averment in declaration of readiness and willingness to transfer shares, evidence necessary to support. *Humble* v. *Langston*, 533

12. Where a clause in an act of Parliament furnishing a defence to an action of trespass contains a proviso or exception, the defendant should negative it in his plea; but where the proviso or exception is in another clause, in order to shew the case to be within it, or the former clause not applicable, such matters should be replied. *The Grand Junction Railway Co.* v. *White*, 559

13. By a Railway Act (1 Vict. c. xcv, s. 75,) it is enacted, that in case any owner of a share shall neglect or refuse to pay the calls upon it, it shall be lawful for the Company to sue for and recover the same in any of her Majesty's Courts of Record in Dublin; and sect. 77 gives a concise form of declaration, "that the defendant is indebted for calls, &c." without setting forth the special matter.

To a declaration under the latter section in an action for calls brought in England, the defendant pleaded "that this Court ought not to take further cognizance of the action, because it is enacted by the said statute, (sect. 75), that in an action for calls, it shall be lawful for the said Company to sue for and recover the same in any of her Majesty's Courts of Record in Dublin, and that he was therefore liable to be sued in those Courts, *and not elsewhere*; and this the defendant is ready to verify; therefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid."

Held, on demurrer to this plea, that although in form a plea to the jurisdiction, yet as it disclosed matters in bar of the action, it might be made use of for that purpose; and that therefore the declaration was open to the objection of being bad at common law.

And that the plaintiffs not having followed the remedy given by the act, could not avail themselves of the concise form of declaring given by that act. *The Dundalk Western Railway Co.* v. *Tapster*, 586

14. In an action against a Railway Company as common carriers, for refusing to carry and convey goods, the declaration averred, that the "plaintiffs were ready and willing, and then offered to pay the defendants such sum of money as they were legally entitled to receive, for the receipt and carriage and conveyance of the said goods, and all other charges whatsoever, to wit, the sum of £2:"—*Held*, sufficient on special demurrer, and that it was not necessary to make, or to aver a strict legal tender. *Pickford* v. *The Grand Junction Railway Co.*, 192

15. A declaration stated, that certain shares were by the contract to be

delivered in a reasonable time, and averred that within such reasonable time the plaintiff was ready and willing and offered to transfer the shares to the defendant, but the defendant discharged him from tendering or transferring the same, and refused to accept them, &c. Plea, That *within a reasonable time, to wit, on the 30th of August*, 1840, *he, the defendant, was ready and willing and offered to accept, and pay for, and requested the plaintiff to deliver the said shares*, but that plaintiff would not then, or at any time within a reasonable time, deliver them, whereupon the defendant rescinded the contract, and refused to accept the shares. Replication, That *within a reasonable time after the making of the mutual promises, to wit, on the 26th of August*, 1840, *plaintiff was ready and willing and offered to deliver and requested the defendant to accept the shares*, and that defendant refused to accept the same, and discharged the plaintiff from tendering them, *absque hoc*, that the defendant, *at or after the time when the plaintiff was ready and willing and offered to deliver, and requested the defendant to accept the shares*, or at or after the time when the defendant discharged the plaintiff from tendering the same, *was ready and willing, or offered to accept, or pay for, or requested the plaintiff to deliver the said shares*. Issue.

Held, that on these pleadings it was incumbent on the defendant to shew that he was ready and willing to pay for the shares during the whole of the time stated as a reasonable time for delivery, and that after verdict it was to be presumed that the jury found the plaintiff was ready during such reasonable time to deliver the shares. *Stewart* v. *Cauty*, 616

16. In an action for calls, the declaration stated, that the defendant, having before the commencement of the suit been a proprietor of shares, was and still is indebted to the Company for a call on each of such shares, and that by reason of the calls remaining unpaid an action had accrued to the plaintiffs. Plea, That the call was made payable on——, and that the defendant transferred his shares by deed to one C. T., and that the Company entered a memorial of the transfer, according to the provisions of the act, before the call was payable. Verification. On special demurrer to this plea:—

Held, that no right of action for a call is given by the act, or exists independently of it, against a party (not appearing to be an original subscriber) who had held the share at the time a call was made, but who had transferred and entered a memorial of his transfer before the call was payable; and that the duty to pay a call in such case does not arise until the day appointed by the directors for payment.

Held also, that supposing the declaration did shew a cause of action, it was well answered by the plea, which was good in substance and in form, and properly concluded with a verification. *The Aylesbury Railway Co.* v. *Mount*, 679

17. *Held*, that, notwithstanding the provisions of the act necessary to make him a proprietor had not been complied with, the defendant, by his representation and claim to be registered, had precluded himself from taking advantage of such objection, and was therefore liable for the calls on his shares.

And that this, being matter of estoppel *in pais*, might be used as evidence in answer to the defence, without being pleaded. *The Cheltenham and Great Western Union Railway Co.* v. *Daniel*, 728

POOR RATE.

See RATING.

PORT.

See MANDAMUS, 3.
RATING, 2.

By the Stockton and Darlington Railway Act, (1 & 2 Geo. 4, c. xliv, s. 62), the following tonnage rates are authorized to be taken:

1. For *all coal* (amongst other things) carried upon the railway, such sum as the Company shall appoint, not exceeding 4*d.* per ton per mile.

2. For all articles, matters, and things, *for which a tonnage is hereinbefore directed to be paid*, which shall pass the inclined plane on the said railway, such sum as the Company shall appoint, not exceeding 1*s.* per ton per mile.

3. And for all coal which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees, *for the purpose of exportation*, such sum as the Company shall appoint, not exceeding ½*d.* per ton per mile.

Held, that the third branch excepts coal for exportation out of the operation of the first branch, and imposes the duty of ½*d.* instead of 4*d.* per ton thereon.

And that "exportation" includes a carrying out of the port of Stockton to any other port or place in the United Kingdom, as well as to foreign parts.

Held, also, that coal so carried along the railway for exportation is liable to the payment of toll for the inclined plane.

And that, under the circumstances, the *port* of S. included places within the legal port, but at some distance from the town, though the act (in section 1) had spoken of "the *port* and *town* of S."

Where the language of an act of Parliament obtained by a Company, imposing a rate or toll upon the public, is ambiguous, that construction is to be adopted which is more favourable to the interest of the public, and against that of the Company. *Barrett* v. *The Stockton and Darlington Railway Co.*, 443

PRACTICE.

See AFFIDAVITS.
COSTS.

PRECAUTION.

Equivalent to *care and skill*. *Davis* v. *The London and Blackwall Railway Co.*, 16

PROPRIETORS

1. And "subscribers," *quære*, distinction between. *The Great North of England Railway Co.* v. *Biddulph*, 401

2. Having parted with their shares, under what circumstances competent witnesses. *Bell* v. *The Hull and Selby Railway Co.*, 279

PROVISO.

See CONSTRUCTION OF STATUTES, 2, 12.
PLEADING, 12.

PUBLIC INTEREST.

See MONOPOLY.

PURCHASE-MONEY.

See BANK OF ENGLAND.
CONVEYANCE, 6, 7.
VENDOR AND PURCHASER, 2.

RAILWAY WORKS.

See BRIDGE.
DAMAGE, 2.
RATING, 3.

RATING.

1. By an act of Parliament certain persons were authorized to make the river Avon navigable from B. to H., and to maintain such navigation; and for those purposes (amongst other things) to make new cuts through lands adjoining, and to build bridges and water-locks, and to set out and appoint towing-paths for men, first giving satisfaction to the owners of lands; and commissioners were appointed to settle by inquisition what satisfaction every person should have for such proportion of his lands as should be made use of for such purposes, and what share of such satisfaction every person having a particular estate or interest therein, should receive for his respective interest. The undertakers, in consideration of the expenses, were authorized to take for their own use certain tolls. By a subsequent act, which recited that they had proceeded to *purchase* certain lands under the former act, they were empowered to make a horse towing-path, with similar provisions as to the purchase of lands. They made the river navigable, and made a certain cut, lock and horse towing-path, for the purpose of the navigation, in and upon lands taken by virtue of inquisitions under both acts, which assessed as damages thirty years' purchase to some, and an annual payment to others. No actual conveyances were ever made.

Held, that the Company were liable to be rated to the poor for such cut, lock and towing-path, and that no conveyance was necessary for lands taken under such powers. *The Bath River Navigation Co.* v. *Willis*, 7

2. By the Bristol Dock Act (43 Geo. 3, c. 140, local and personal, public) a Company were empowered (amongst other works) to convert a portion of the river Avon into a floating harbour, and to make a new course for the river, and a bason to connect the new course with the floating harbour. And sect. 74 enacted, that certain rates and duties should be payable to the Company for every ship or vessel *entering into the port* of Bristol, to be applied for the purposes of the act, that is to say, by s. 25, after paying interest and expenses of repairs, &c., the surplus was to be divided among the subscribers. The port of Bristol is entered in the river Severn, several miles from the parish in which the bason is situate.

Section 64, reciting that the lands to be taken for the above purpose would, during the time the said intended works were carrying on, and for many years after, be rendered unproductive and incapable of being rated in aid of the land and parochial taxes, enacted that the Company should become chargeable from the time of their entering into and taking possession of such lands, &c., with all such land and parochial taxes as the same lands and premises then were or might thereafter be subject to.

Held, that no portion of the dues payable by ships on entering the port was a profit arising from the bason, and that the bason was rateable to the relief of the poor as ordinary

land. *Regina* v. *The Bristol Dock Co.*, 571

3. A Company under the powers of a Railway Act (4 & 5 Will. 4, c. lxxxviii,) purchased lands, on which they constructed a line of railway, and warehouses and station-houses for the convenience of passengers, and of receiving and stowing goods. They were authorized and required by the act to provide locomotive power, and to let out their carriages, or allow the railway to be used by other persons who had themselves provided carriages to travel on it.

Section 172 provides, that all persons shall be at liberty to use the railway, on payment of certain tolls to the Company (the *maximum* of which is fixed by sect 149), and subject to certain rules therein provided for, as to the construction of engines, carriages, police regulations, &c., which are to be according to the order of the directors of the Company. There was no corresponding provision as to the right to use the warehouses, station-houses, &c.

Section 157 provides, that where the Company shall carry for their own profit, they shall keep separate accounts, shewing the amount of tolls which they would have received if the conveyance of the goods and passengers had been effected by other persons; to which separate accounts the overseers of the several parishes, through which the railway passes, shall have free access. There was no provision for keeping such accounts when other parties carried the goods or passengers.

A subsequent act (1 Vict. c. lxxi, s. 82,) recites the 157th section of the 4 & 5 Will. 4, and that it was provided by that act that such separate accounts should be kept when other parties carried the goods or passengers, and imposes a penalty on the Company in case of neglect to do so. The Company have not, in fact, leased the railway, nor have any other persons than themselves been carriers upon it.

Held, that the principle of rating was to be calculated according to the value of the land, as increased by the line of railway and buildings.

And that the Company were properly assessed upon the annual rent which a lessee, capable of deriving all the profits which now accrue to the Company, would give for the railway, with its fixtures and appurtenances, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, and deducting for repairs, insurance, and other expenses necessary to maintain the railway, its fixtures, and appurtenances, in a state to command such rent, and not merely for the tolls which the Company would receive for the use of the railway by others.

And that such amount was to be distributed amongst the assessments of the several parishes, in proportion, not to the length of railway, but the actual earnings in each parish. *Regina* v. *The London and South Western Railway Co.*, 629

READY AND WILLING.

See CARRIER, 1.
PLEADING, 3, 11, 14, 15.

REGISTER.

See BOOKS OF COMPANY.

REPAIRS.

See MANDAMUS, 3, 4, 5, 6.

REPRESENTATION.

1. Where a defendant, on purchasing his shares, received a transfer with a blank for the name of the purchaser, and stating the consideration

untruly, which however he forwarded to the secretary with a claim to be registered as proprietor:—*Held*, that having made such representation to the Company as to induce them to register him, he was precluded by his representation from objecting to the transfer. *The Sheffield, Ashton-under-Lyne, and Manchester Railway Co.* v. *Woodcock*, 522

2. After the passing of the act, the Company made out a list of proprietors, in which A.'s name was inserted as proprietor of —— numbered shares. They also issued circulars requesting to know what numbers the several proprietors intended to retain. In reply, A. stated that he had disposed of the numbers standing in his name; and soon afterwards the defendant sent in the scrip certificates which had been delivered to A., *claiming to be registered as a proprietor* in respect thereof. He accordingly received from the Company a receipt for the scrip certificates, with a notice, that they would be exchanged for sealed certificates on demand. The defendant never applied for or received them; nor was any regular transfer made by him or A., or any memorial of transfer entered, as required by the act.

Held, that, notwithstanding the provisions of the act necessary to make him a proprietor had not been complied with, the defendant, by his representation and claim to be registered, had precluded himself from taking advantage of such objection, and was therefore liable for the calls on his shares.

And that this, being matter of estoppel *in pais*, might be used as evidence in answer to the defence, without being pleaded. *The Cheltenham and Great Western Union Railway Co.* v. *Daniel*, 728

RESERVATION (IN LEASE).

See AGREEMENT, 1.
DEED, 1.

RETURN.

See MANDAMUS, 1, 3, 4, 6.

RIVERS.

See MANDAMUS, 1, 3.
RATING, 1, 2.

ROAD.

See MANDAMUS, 4, 5, 6, 7.

The preamble of the London and Brighton Act, after reciting that the establishment of a railway communication between London and Brighton will be of great public advantage, enacts (sect. 3)—That it shall be lawful for the Company to make and maintain a main line of railway and branches, with all proper warehouses, wharfs, and all other suitable and proper warehouses, wharfs, and all other suitable and proper works, communications, approaches, and conveniences attached to or connected with the same.

By the 12th sect. the usual powers are conferred on the Company for making and maintaining the railway, and (among others) to make or construct upon, across, or over any roads, &c., such roads, ways, cuttings, &c., as the Company shall think proper.

The Company having purchased a private wharf, separated from one of their terminus stations by a turnpike road, laid down on the road stone blocks, so as to form two runs or

stone ways level with the road, for the purpose of facilitating the passage of goods from the wharf across the road to the station.

Held, that the Company were not authorized by their act to interfere with the road in such a manner.

An injunction, which had been granted to restrain the trustees of the road from removing the stone blocks, was dissolved, although in the opinion of the Court no damage could result from the stone blocks, either to the road or the passengers upon it. *The London and Brighton Railway Co. v. P. Cooper*, 312

SCRIP.

See SHARES.
VENDOR AND PURCHASER, 1.

An understood mode of transfer. *The London Grand Junction Railway Co. v. Freeman*, 468

SEAL, COMMON.

See CALLS, 3.
EVIDENCE, 3, 6.

SHARES.

(*Equity.*)

1. Certain persons, proposing to solicit an act of incorporation for making docks, executed the usual parliamentary deed and deed of management; by the first whereof they bound themselves (*inter alia*) to pay the sums subscribed by each of them as the directors should appoint. By the second they agreed to be bound by all measures which the directors should think expedient or necessary for obtaining the act.

A bill for the above purpose passed the House of Commons. A standing order of the House of Lords provides, "That no bill, for making (*inter alia*) a dock, shall be read a third time unless four-fifths of the probable expense of the proposed work shall have been subscribed for. To comply with this order, and to make up the necessary capital, nine of the directors subscribed for 1000 additional shares each. The bill passed into an act, which provided (sections 94 and 95), That ten or more subscribers holding a specified number of shares might summon general meetings. Section 125—That subscribers should pay calls on shares as the directors should appoint, which shares the directors might declare forfeited on non-payment of calls. Section 132—Which enabled holders of shares to sell them, and prescribed the form of conveyance, and memorial.

Several of the shareholders, and, amongst them, the plaintiff, registered their shares, but the subscribers for the 1000 additional shares did not register. At the time of entering into the additional subscriptions, the directors subscribing signed a memorandum declaring, that the additional shares were held by them in trust for the Company. At a meeting of the directors a resolution was passed, "That the additional shares should be held in trust for the Company. At a special general meeting of the Company a resolution was passed—That the trust entered into for the Company should be annulled, and that the additional shares should be transferred to the secretary; and at a meeting of directors such resolution was subsequently confirmed.

The directors made two calls which were paid on the registered shares, but not on the additional shares. A

third call having been made, and the plaintiff having not paid it, the directors were proceeding to declare his shares to be forfeited:

Held, that the transfer of the additional shares to the secretary of the Company without the specified form of conveyance and memorial was void. *That* the directors could not enforce the penalties imposed by the act on the non-payment of the third call on the plaintiff's shares until they had taken steps to compel payment of the first two calls on the additional shares.

That a suit for restraining the directors from declaring the plaintiff's shares forfeited was well framed by the plaintiff on behalf of himself and all other the members not defendants, against those parties as defendants who had subscribed for the additional shares. *The Preston* v. *Grand Collier Dock Co.*, 335

(*Law.*)

(*Transfer.*)

2. The London and Brighton Railway Act (1 Vict. c. cxix, s. 155) provides, that the form of conveyance of shares shall be by writing, duly stamped, under the hands and seals of the parties, and that on every sale the *deed* or *conveyance* shall be kept by the Company, and an entry of the memorial of such transfers and sale shall be indorsed on the said *deed* of sale or transfer. Section 157 provides against any transfer of shares till all the calls on them are paid.

The plaintiff in September, having agreed to sell to the defendant fifty shares to be delivered on the 1st of March, bought of R. W. P. (through brokers) fifty shares to be delivered on the 15th of December next, on which day R. W. P. delivered to him fifty certificates and three transfers for shares with blanks for the purchaser's name, the consideration, and the date. On the 1st of March the plaintiff tendered these certificates and transfers to the defendant, who refused to accept them; at that time there were some calls due, but that objection was waived.

To an action brought to recover the difference of price between December and March, the defendant pleaded (amongst others), 1. That the plaintiff was not ready to transfer the fifty shares to him, nor offered to execute to him or his nominee *a legal transfer* of them. 2. That the plaintiff was not at the time of the agreement the proprietor of the fifty shares, and had no good right or title to execute a legal transfer of them. 3. That, at the time of the said contract, the plaintiff was not possessed of or entitled to, nor had entered into any contract for the purchase of, nor had any reasonable expectation of becoming possessed of or entitled to, any such shares, otherwise than by afterwards purchasing them. (This last plea was held bad on general demurrer).

Held, that the form of conveyance required by the statute is a *deed*, and that an instrument of transfer executed by the owner of the shares, with a blank for the name of the purchaser, and delivered to the plaintiff, by whom, on the sale of them, the name of the purchaser was to be inserted, was void:

And that the non-payment of the calls would have been a valid objection, but that a waiver of it by parol was sufficient to remove it.

Semble, that the plaintiff could not give the defendant an implied covenant for title, R. W. P. being the actual owner of the shares. *Hebblewhite* v. *M'Morine*, 51

3. Shares in a Company are not an "interest in land," nor "goods, wares, and merchandize," within the 17th

section of the Statute of Frauds, (29 Car. 2, c. 3), and therefore a contract for the sale of such shares is not required to be by note in writing, &c., as provided in cases within the said section.

Semble, There is a distinction between these words of the Statute of Frauds, and the words "goods and chattels," used in the Bankrupt Act (6 Geo. 4, c. 16, s. 72). *Humble* v. *Mitchell*, 70

4. By the London Grand Junction Railway Act (6 & 7 Will. 4, c. civ,) the Company are required (s. 145) "to cause the names and additions of the several persons who shall then be or shall thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said Company, and after such entry made to cause their common seal to be affixed thereto." By sect. 147 it is enacted, "that the Company shall, in some proper book to be provided by them for that purpose, enter and keep a true account of the places of abode of the several proprietors of the undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein." And sect. 152 enacts, "that, in any action to be brought by the Company against any proprietor for the time being of any share in the said undertaking to recover any money due and payable for or in respect of any call, in order to prove that the defendant, at the time of making such call, was a proprietor of such share as alleged, the production of the book in which the said Company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons who shall from time to time become proprietors thereof or be entitled to shares therein, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number and amount of his shares therein:"—*Held*, that the book thus made evidence by sect. 152 is the book which the Company are required by sect. 145 to keep.

And that a book kept by the Company, containing the names and additions of all the persons whom they supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscriptions paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the Company—was a book substantially kept in compliance with the act, and admissible in evidence, though it contained names of persons not entitled, and omitted some of persons who were entitled to shares, and some entries to which there was no seal affixed.

Held also, that the *primâ facie* evidence of the defendant being a proprietor, supplied by the production of this book, was not rebutted by proof that another person was the original subscriber to the parliamentary contract in respect of the shares in question, and had not conveyed them to the defendant by deed, as required by sect. 155; and therefore that the defendant, who having before the passing of the act become entitled by the then well-understood mode of transfer (in the form of scrip) was afterwards registered as a shareholder, was liable to pay calls on such shares. *The*

London Grand Junction Railway Co. v. *Freeman*, 468

5. By a Railway Act (7 Will. 4, c. xxi, s. 115,) it was provided that the directors should have power from time to time to make such calls from the proprietors of shares as they from time to time should find necessary, with an interval of three calendar months at the least between each call, and twenty-one days' notice of each by advertisement, and that the proprietors of shares should pay the sums of money subscribed for to such person at such time and place and in such manner as the said directors should from time to time direct or appoint. The directors made a resolution, on the 13th of March, "that a call *shall be* made on the 30th March to be paid on the 1st of May." The resolution did not state the place where, nor the person to whom payment was to be made, but the advertisement of notice inserted in the newspapers did contain those particulars. In an action against a defendant, a proprietor at each of the three dates, and no evidence being given of any change in the directors during that time:—*Held*, that the directors might fix the time, place, and manner of payment after the original resolution had been made, and by a distinct act.

And that the call was not invalid, from the resolution being prospective.

Section 150 provided, that if any director should directly or indirectly be concerned in any contract with, or hold any office or place of trust or profit under the Company, he should be thereby discharged from the direction:—*Held*, that this clause related to contracts with the Company in execution of their undertaking, and did not disqualify those directors who were also members of a bank employed by the Company.

By section 159 it was enacted, that the orders and proceedings of the meetings of the Company should be entered in a book, and signed by the chairman of the meeting, and should be allowed to be read in evidence without proof of the meeting having been duly convened, or of the persons making such orders, &c., being proprietors or directors, or of the signature of the chairman, "all of which shall be presumed:"—*Held*, that it was not necessary to prove that a signature "W. S., deputy chairman," was signed by W. S., or that he was deputy chairman, and presided at the meeting.

Where a defendant, on purchasing his shares, received a transfer with a blank for the name of the purchaser, and stating the consideration untruly, which however he forwarded to the secretary with a claim to be registered as proprietor: — *Held*, that having made such representation to the Company as to induce them to register him, he was precluded by his representation from objecting to the transfer.

And that a transfer of shares from an original subscriber, after the passing of the act, is good, although made before the sealing of the register of proprietors, and although the original subscriber be never registered as a proprietor. *The Sheffield, Ashton-under-Lyne, and Manchester Railway Co.* v. *Woodcock*, 522

6. On the 20th of February, 1838, a contract was entered into (through brokers) by the plaintiff to sell, and the defendant to buy, thirty railway shares, at £— per share, no time being specified for the completion of the purchase. On the 3rd of March the defendant wrote to the plaintiff's brokers requesting them to dispatch the thirty shares forthwith, which they accordingly did the same day, with a transfer *in blank*, and the purchase-

money was paid. The shares not being registered in the defendant's name, the plaintiff, still continuing the apparent owner, was compelled to pay the calls which were subsequently made on the shares. In an action against the defendant for not indemnifying the plaintiff from such liabilities: — *Held*, that, under these circumstances, there was no undertaking implied by law to indemnify against subsequent calls, nor any evidence of such an undertaking in point of fact.

Held, also, that there was sufficient evidence to support the averment in the declaration, that "the plaintiff hath always, from the time of the sale of the shares and making the promise hitherto, been ready and willing to transfer the shares to the defendant according to the terms of the said contract:" but that if it had been necessary, in order to support this allegation, to prove the tender of a valid conveyance, the above evidence would not have been sufficient. *Humble* v. *Langston*, 533

7. The London and Brighton Railway Act (1 Vict. c. cxix, s. 140) enacts, that the Company shall enter the names and additions of the shareholders in a book, and cause the common seal to be affixed thereto; and, section 142, that they shall enter in a book the names and places of abode of persons who from time to time shall be entitled to any share in the undertaking; and section 148 provides, that in an action for calls it shall only be necessary to prove that the defendant was a proprietor of the shares, and that a notice was given of the calls; and that the production of the *books* abovementioned shall be *primâ facie* evidence that the defendant is a proprietor.

Held, that the production of the book required by the 140th section, containing the defendant's name, as proprietor of the shares, was alone not sufficient *primâ facie* evidence of his being a proprietor.

Section 155 gives a form of transfer of shares, and provides that on every sale the deed of conveyance (being executed by the seller and purchaser) shall be kept by the Company, who shall enter in a book a memorial of such transfer, and indorse the entry thereof on the said deed, and, until such memorial shall have been made and entered, the seller shall remain liable for calls.

Held, that a deed of transfer of shares to the defendant, which had been first executed by the vendor to J. H. as purchaser, and upon which the purchase-money was paid, which was afterwards altered by having the name of J. H. struck through, and the defendant's inserted, and then re-executed by the vendor without being re-stamped, was void.

Held, also, that the resolution for making calls need not specify a time or place of payment.

And that proof of the entry of the memorial of a transfer-deed, under section 155, is not necessary to enable the Company to recover, the provisions of that section being intended only for the security of the Company. *The London and Brighton Railway Co.* v. *Fairclough*, 544

8. By a Railway Act (6 Will. 4, c. lxxxvii, s. 101) it was provided, that proprietors might transfer their shares on certain conditions; that the deed of transfer should be kept by the Company, who were to cause a memorial of such transfer to be entered in a book to be kept for that purpose. Section 96 gave power to make calls, on giving twenty-one days' notice, and provided, that if any owner or proprietor *for the time being* should not pay his calls, he should be liable to pay interest; and section 98 provided

that on the trial it should be only necessary to prove that the defendant, *at the time of making such calls*, was a proprietor.

An action was brought by the Company against the defendant for two calls, notice of the first having been given 6th March, payable 9th April, and of the second 23rd June, payable 28th July. A deed of transfer of the shares from the original holder to the defendant was produced, and the transfer book of the Company, containing a memorial of the transfer, both dated 7th April, but there was no other evidence of the time when the entry was made :—

Held, that the transfer book was admissible, and was reasonable evidence to shew the entry was made when it bore date ; and that the defendant, not having been a proprietor till 7th April, after the day when the first call was *made* (not *payable*), was not liable to the first, but only to the second call. *The Aylesbury Railway Co.* v. *Thompson*, 668

9. By a Railway Act (6 Will. 4, c. lxxxvii,) the Company are authorized (s. 95) to sue *subscribers* who neglect to pay the calls on their shares. Sect. 96 empowers the directors to make calls of money from the *subscribers* and *proprietors for the time being*, and, in default of payment, to sue for the calls or to declare the shares forfeited. Sect. 98 provides, that in an action against such proprietor for the time being, it shall be sufficient to declare that the defendant being a proprietor of a share is indebted in £— for a call, whereby an action hath accrued to the Company, without setting forth the special matter ; and sufficient to prove that the defendant at the time of making such call was a proprietor of a share, and that the call was made, and notice given as directed by the act. Sect. 101 enables proprietors to sell their shares : providing that on every such sale the deed or conveyance executed by the seller and purchaser shall be kept by the Company, who shall enter in a book a memorial of the transfer, and indorse the entry thereof on the deed, and on the certificate of the share sold : and until such memorial shall have been made and entered, the seller shall remain liable for calls, and the purchaser shall have no part of the profits, nor interest paid, nor vote in respect of such share. Sect. 102 prohibits the sale by any person of any share on which a call shall have been made, *after the day appointed for payment of the same*, unless at the time of such sale he shall have paid the full sum called for in respect thereof.

In an action for calls, the declaration stated, that the defendant, having before the commencement of the suit been a proprietor of shares, was and still is indebted to the Company for a call on each of such shares, and that by reason of the calls remaining unpaid an action had accrued to the plaintiffs. Plea—That the call was made payable on ——, and that the defendant transferred his shares by deed to one C. T., and that the Company entered a memorial of the transfer, according to the provisions of the act, before the call was payable. Verification. On special demurrer to this plea :—

Held, that no right of action for a call is given by the act, or exists independently of it, against a party not appearing to be an original subscriber, who had held a share at the time a call was made, but who had transferred and entered a memorial of his transfer before the call was payable ; and that the duty to pay a call in such case does not arise until the day appointed by the directors for payment.

Held also, that supposing the de-

claration did shew a cause of action, it was well answered by the plea, which was good in substance and in form, and properly concluded with a verification.

Semble, that there are only three cases in which an action for calls can be maintained under the act. 1. Against *a subscriber*, under sect. 95. 2. Against *an owner for the time being*, under sect. 96. 3. Against a party who having transferred his shares is no longer a shareholder, but whose liability is continued by sect. 101, no memorial of transfer having been entered. *The Same* v. *Mount*, 679

(*Claim to be registered for.*)

10. Before the passing of a railway act, A. signed the subscribers' agreement and parliamentary contract for —— shares, and paid a deposit of £—— per share, upon which scrip certificates were delivered to him, which contained a notice that they were not transferable before the act should pass.

The act passed, (6 Will. 4, c. lxxvii,) containing the following provisions:—By sect. 5, the mode for a party to become a subscriber is by subscribing the parliamentary contract, or becoming an assignee afterwards, according to the statute. Sect. 138 requires the names of proprietors from time to time to be entered in a book, to which their common seal is to be affixed, and provides for the delivery of a sealed ticket to every registered proprietor on demand. And sect. 148 authorizes proprietors of shares to sell them, by conveyance in writing to be kept by the Company, who are to enter in a book a memorial of the transfer, and make an indorsement of such entry on the deed of transfer, and of the transfer on the certificate of each share sold; and until such memorial shall have been made and entered, the seller is to be liable for calls, and the purchaser not to be entitled to any privileges.

After the passing of the act, the Company made out a list of proprietors, in which A.'s name was inserted as proprietor of —— numbered shares. They also issued circulars requesting to know what numbers the several proprietors intended to retain. In reply, A. stated that he had disposed of the numbers standing in his name; and soon afterwards the defendant sent in the scrip certificates which had been delivered to A., *claiming to be registered as a proprietor* in respect thereof. He accordingly received from the Company a receipt for the scrip certificates, with a notice, that they would be exchanged for seal certificates on demand. The defendant never applied for or received them; nor was any regular transfer made by him or A., or any memorial of transfer entered, as required by the act.

Held, that, notwithstanding the provisions of the act necessary to make him a proprietor had not been complied with, the defendant, by his representation and claim to be registered, had precluded himself from taking advantage of such objection, and was therefore liable for the calls on his shares.

And that this, being matter of estoppel *in pais*, might be used as evidence in answer to the defence, without being pleaded. *The Cheltenham and Great Western Union Railway Co.* v. *Daniel*, 728

11. Before the passing of a Railway Act (6 & 7 Will. 4, c. civ,) the defendants became possessed of scrip certificates of shares, (which had belonged to original subscribers), they did not, however, sign the parliamentary contract. After the act passed, in pursuance of notice by the Company, the defendants sent in the certificates,

with a claim to be registered, and they were registered accordingly. No memorial of sale to either was entered, but one paid a call on his shares, and the other attended a meeting of the Company. The register-book was correct in the particulars required by the statute (s. 145) as to the defendants, but did not contain the names of all the original subscribers, and contained the names of some who were not so.

Held, that the defendants were liable as proprietors of shares, and that the register-book was *primâ facie* evidence against them. *The London Grand Junction Railway Co.* v. *Graham. The Same* v. *Gunstone*, 870

(*Forfeiture of.*)

See PLEADING, 1.

12. By the Southampton Dock Act, (6 Will. 4, c. xxix), it is provided (sect. 84), that in an action for calls, in order to prove that the defendant was a proprietor of such shares in the undertaking as alleged, the production of the book in which the secretary of the Company is by this act directed (sect. 89) to enter and keep a list of the names and additions and places of abode of the several proprietors of shares, with the number of shares they are respectively entitled to hold, shall be *primâ facie* evidence that such defendant is a proprietor, and of the number or amount of his shares therein. Section 89 requires the Company from time to time to cause the names, additions, and places of abode of the persons from time to time entitled to shares, with the number of their shares and amount of subscriptions paid thereon, and the proper number by which every such share shall be distinguished, to be entered in a book to be kept by the secretary.

Held, that the provision as to the making the entries is only directory, and that an omission or irregularity in the entries in the book, relating to other shareholders, does not render the book inadmissible against the defendant, as being the book kept under the act.

And that it is not necessary that the entries should be made by the secretary's hand. *The Southampton Dock Co.* v. *Richards*, 215

13. By a Railway Act, (6 & 7 Will. 4, c. cxxxi, s. 50), it is provided, that in actions for calls, it shall be sufficient for the Company to declare that the defendant, being a proprietor of —— shares, is indebted to the Company in £—— upon such shares belonging to the defendant as the case may happen to be, whereby an action hath accrued to the said Company by virtue of the act, without setting forth the special matter, and that on such action it shall be only necessary to prove that the defendant, at the time of making such call, was a proprietor of —— shares in the said Company, and that such call was in fact made, and such notice thereof given as directed by the act. By section 49, the Company are empowered to make calls (as therein provided), and either to sue for and recover the same, or otherwise, in the option of the directors, such proprietor neglecting to pay the same shall forfeit all his shares and interest: Provided always, that no advantage shall be taken of any such forfeiture, until notice thereof in writing shall have been given to such proprietor, nor unless the same shall be declared to be forfeited at some meeting of the Company, general or special, within six months after such forfeiture, which declaration shall, *ipso jure*, be a forfeiture of such shares.

To an action of debt for calls (the declaration being in the general form given by section 50) the defendant

pleaded—1st. That he was not nor is indebted *modo et formâ*, &c. 2nd. That no notice of the calls was given as required by the act. 3rd. That the directors did not appoint any time, manner, or bank for payment. 4th. That the defendant, having neglected to pay his calls, the said shares were declared by the directors to be forfeited, and the said directors then exercised and declared their option that the same should be, and they were, forfeited; of which the defendant had due notice, and acquiesced therein. 5th. That the action was commenced after sale of the shares by the defendant, without his having paid the calls thereon, whereby the shares became forfeited, of which the plaintiffs had notice, and the said forfeiture was duly ratified and declared in the manner directed by the act. The four last pleas concluded with a verification. Special demurrer to the four.

Held, that the allegation of notice, being one of the facts required by the act to be proved by the plaintiffs, must be taken to be impliedly contained in the declaration; and, therefore, that the 2nd and 3rd pleas were bad for not concluding to the country, being a denial of a fact so impliedly averred.

And that the 4th and 5th pleas were bad for not shewing that the shares were declared forfeited at a general or special meeting of the company, as provided by the act.

Semble, that the plea of *nunquàm indebitatus* puts in issue all the matters required by the statute to be proved by the plaintiffs in such action. *The Edinburgh, Leith, and Newhaven Railway Co.* v. *Hebblewhite*, 237

14. By a Railway Act (6 & 7 Will. 4, c. lxxix, s. 130) it was enacted, that if any owner or proprietor for the time being of a share should neglect or refuse to pay the calls thereon, the Company might sue for and recover the same, or the directors might declare his shares to be forfeited and order them to be sold. Provided that no advantage should be taken of such forfeiture until notice to the owner that such share hath been declared forfeit, nor until such declaration of forfeiture shall have been confirmed at a general or special general meeting of the Company.

In an action for calls, it was proved that the Company gave notice to the defendant, that if the calls were not paid by a certain day, the shares would be declared forfeited. The calls were not paid, and the defendant afterwards tendered his vote at a meeting of proprietors, when it was rejected, but the forfeiture was never confirmed by a meeting of the Company.

Held, that the defendant could not avail himself of the state of facts as a defence to the action, on the ground of not being a proprietor, as the forfeiture does not attach till sanctioned by a meeting of proprietors.

Held also, that the holders of scrip certificates were properly entered before the passing of the act as proprietors, though they had neither signed the parliamentary contract nor been original subscribers.

And that the register-book, though irregularly kept (not containing the amount of the subscriptions paid on the shares, sect. 125), was *primâ facie* evidence that defendant was a proprietor. *The Birmingham, Bristol, and Thames Junction Railway Co.* v. *Locke*, 867

(*Proprietors and Subscribers.*)

15. In an action by a Railway Company for calls, the declaration stated that the defendant subscribed for a sum of money, to wit, &c., to-

wards the undertaking, and for certain shares therein. In the 195th section of their act it was recited, that part of the capital authorized (by section 1) to be raised, had been subscribed for by several persons "under a contract, binding themselves, their *heirs*, &c." On motion in arrest of judgment, on the ground that the declaration should have alleged the subscription to have been by deed: —*Held*, that the declaration was sufficient after (and *semble* before) verdict.

Semble, also, that in an action against an original subscriber, the Company need not declare specially on the deed executed before the passing of the act, and that a deed is not necessary in the case of subsequent subscribers.

By section 119, the subscribers are required to pay their amount of subscription, as called for by the directors, "at such times and places, and to such persons as shall be directed by the said directors." Section 121 empowers the directors to make calls, at intervals of three months between the days of payment, and requires that twenty-one days' notice shall be given of each call by advertisement, and that the money called for shall be paid to such persons, at such times and places, and in such manner, as in the said notice shall be appointed. A resolution of the directors was made for a call of £8, but did not mention the place where, or person to whom the money was to be paid; but the notice (signed by the clerk under section 183) did specify those particulars:—*Held*, that, assuming the notice to have been the act of the directors, (which was not disputed at the trial), the call was properly made.

Quære, whether there is a distinction between *proprietors* of shares and *subscribers*. *The Great North of England Railway Co.* v. *Biddulph*, 401

(*Action for not accepting.*)

16. In an action for not accepting railway shares sold at Liverpool to be delivered in a reasonable time, a rule of the Liverpool Stock Exchange acted upon by all the Liverpool brokers, and seen by the defendant, "that the seller of shares is, in all cases, entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he is made acquainted with the name of his transferee," was held admissible as evidence of the reasonableness of the time for completing the contract, on an issue as to the plaintiff's being ready and willing to do so.

Where shares are not accepted, and are resold within a reasonable time by the vendor, the measure of damages is the difference between their price at the time of the contract, and at the time of the resale.

The declaration stated, that the shares were by the contract to be delivered in a reasonable time, and averred that within such reasonable time the plaintiff was ready and willing and offered to transfer the shares to the defendant, but the defendant discharged him from tendering or transferring the same, and refused to accept them, &c. Plea, That *within a reasonable time, to wit, on the 30th of August*, 1840, *he the defendant was ready and willing and offered to accept and pay for, and requested the plaintiff to deliver the said shares*, but that plaintiff would not then, or at any time within a reasonable time, deliver them, whereupon the defendant rescinded the contract, and refused to accept the shares. Replication, That *within a reasonable time after the making of the mutual promises, to wit, on the 26th of August*, 1840, *plaintiff was ready and willing and offered to deliver and requested the defendant to accept the shares*,

and that defendant refused to accept the same, and discharged the plaintiff from tendering them; *absque hoc*, that the defendant, *at or after the time when the plaintiff was ready and willing and offered to deliver, and requested the defendant to accept the shares*, or at or after the time when the defendant discharged the plaintiff from tendering the same, *was ready and willing, or offered to accept, or pay for, or requested the plaintiff to deliver the said shares.* Issue.

Held, that on these pleadings it was incumbent on the defendant to shew that he was ready and willing to pay for the shares during the whole of the time stated as a reasonable time for delivery, and that after verdict it was to be presumed that the jury found the plaintiff was ready during such reasonable time to deliver the shares. *Stewart* v. *Cauty*, 616

17. In May, 1840, A. agreed with B. for the purchase of railway shares at £ —— per share. On the 4th of August A. writes to say, that "having received certain information as to some misrepresentation at the time of contract, he gives notice that he shall consider the contract null and void, should such information prove correct. On the 22nd of August he gives a verbal notice of his intention of abandoning the contract, which notice he confirms by a letter of the 24th, in which he refers to that of the 4th for his reasons. The shares were by consent formally tendered to and rejected by A. on the 20th of October.

In an action brought by B. for the loss occasioned by the difference between the price then and at the time of contract:—*Held*, that it was properly left to the jury to say when the contract was finally repudiated, and that they having considered it not to be so until the tender and refusal of the shares, and having given as damages the difference in value then, and not at the time of the notice given on the 4th or 22nd, the Court refused to grant a new trial. *Barned* v. *Hamilton*, 624

SIGNATURE OF CHAIRMAN.

See CALLS, 1, 4.

SPECIAL CASE.

See DAMAGE, 3.

SPECIFIC PERFORMANCE.

A landowner contracted with a Railway Company to sell to them a certain portion of his land; he died; and the legal estate in the lands in question descended to infants:—*Held*, that inasmuch as the vendor, knowing that the purchasers would take that portion of his lands, had suffered the legal estate therein to descend to infants, he had thereby occasioned the necessity for a suit, in order to procure a conveyance of the legal estate; and that the costs of the suit must be defrayed out of the purchase-money. *The Midland Counties Railway Co.* v. *Wescomb*, 211

STATION.

See COMMISSIONERS OF PAVING.

STATUTES.

See CONSTRUCTION OF STATUTES.

STATUTE OF FRAUDS.

See FRAUDS.

STAY-LEAVE.

See DEED, 1.

STOCK-EXCHANGE.

Rules of.

See EVIDENCE, 7.

SUBSCRIBERS (LIABILITY OF).

See SHARES, 1.

1. The directors of a joint stock Company, in order to comply with a standing order of the House of Lords, as a means of procuring an act of incorporation, subscribed for a large additional number of shares in the undertaking, and signed a declaration that they held them in trust for the Company, but did not pay the deposit on or register them. Subsequently, at a special general meeting of the Company, it was resolved that the trust should be annulled, and the shares transferred to the secretary, to be held by him at the disposal of the Company, and this resolution was confirmed at a subsequent meeting of the directors. The directors made calls on the registered shares, and proceeded to enforce payment of them :—*Held*, on demurrer, that the directors were liable in respect of the deposit, and all calls to be made on such additional shares, and that the same must be considered as *bonâ fide* subscriptions.

That they could not be considered as exonerated from such liability by the proceeding taken to annul the trust, and transfer the shares.

That the plaintiff, a registered shareholder, could not be relieved from his legal liability to pay calls on his shares, on the grounds, that the additional subscriptions entered into were fictitious and fraudulent, for the colourable purpose of complying with the order of the House of Lords, and that the capital of the undertaking, *bonâ fide* subscribed for, was inadequate to carry out the project.

Semble, the registered owner of shares in an incorporated Company does not, by a transfer of his shares, get rid of his legal liability to pay calls made previously to the transfer. *Mangles* v. *The Grand Collier Dock Co.*, 359

2. A testator was a registered owner of certain shares in the Eastern Counties Railway Company, in respect of which three calls were made in his lifetime, and seven after his death, but nothing was paid.

In taking the account of his estate before the Master, the Company put in a claim for the amount of such calls, and interest; and the Master having allowed the claim as to the three calls made in the testator's lifetime, but disallowed it as to the seven calls made after his decease, exceptions were taken to the Master's report by the Company, as to the claim disallowed, and by the executors, as to the claim allowed:—*Held*, that the testator's estate was liable to pay, as well the calls made before as those made after his decease, with interest at £5 per cent. *Fyler* v. *Fyler*, 813, 873

SUBSCRIBERS.

See SHARES.
VENDOR AND PURCHASER, 1.

TAXATION.

See COSTS.

TEMPORARY WORKS.

See BANKRUPT, 1.

TENANTS IN COMMON.

See INJUNCTION, 2.

TENDER.

See CARRIER, 1.

TIME (REASONABLE).

See PLEADING, 15.

TITLE.

See SPECIFIC PERFORMANCE.

Implied Covenant for.

See SHARES, 2.

TONNAGE.

See MONOPOLY.

By the Stockton and Darlington Railway Act, (1 & 2 Geo. 4, c. xliv, s. 62), the following tonnage rates are authorized to be taken:

1. For *all coal* (amongst other things) carried upon the railway, such sum as the Company shall appoint, not exceeding 4*d.* per ton per mile.

2. For all articles, matters, and things, *for which a tonnage is hereinbefore directed to be paid*, which shall pass the inclined plane on the said railway, such sum as the Company shall appoint, not exceeding 1*s.* per ton per mile.

3. And for all coal which shall be shipped on board of any vessel or vessels in the port of Stockton-upon-Tees, *for the purpose of exportation*, such sum as the Company shall appoint, not exceeding ½*d.* per ton per mile.

Held, that the third branch excepts coal for exportation out of the operation of the first branch, and imposes the duty of ½*d.* instead of 4*d.* per ton thereon.

And that "exportation" includes a carrying out of the port of Stockton to any other port or place in the United Kingdom, as well as to foreign parts.

Held, also, that coal so carried along the railway for exportation is liable to the payment of toll for the inclined plane.

And that, under the circumstances, the *port* of S. included places within the legal port, but at some distance from the town, though the act (in section 1) had spoken of "the *port* and *town* of S."

Where the language of an act of Parliament obtained by a Company imposing a rate or toll upon the public, is ambiguous, that construction is to be adopted, which is more favourable to the interest of the public, and against that of the Company. *Barrett* v. *The Stockton and Darlington Railway Co.*, 443

TOWING-PATH.

See RATING, 1.

TRANSFER

(*See* SHARES)

With blank for name of purchaser, void. *Hebblewhite* v. *M'Morine*, 51

See also *Humble* v. *Langston*, 533

TURNPIKE ROAD.

See MANDAMUS, 4, 5, 6.

UNDERTAKING.

Land of Company does not pass under assignment of, in mortgage. *Doe* d. *Myatt* v. *The St. Helens and Runcorn Gap Railway Co.*, 756

UNIFORM RATE OF CHARGE.

See MONOPOLY.

VENDOR AND PURCHASER.

1. Certain persons previously to

soliciting an act of incorporation for forming a railway, executed a subscribers' deed and a parliamentary contract, and they received certain scrip certificates as evidence of their subscriptions, and upon which a certain amount had been paid.

The act of incorporation passed, providing for the registering of shares, empowering the Company to make calls, subjecting defaulters in payment to actions for debt, and declaring that their shares should be forfeited, and providing a form for the legal transfer and memorial of shares.

The plaintiff, a party to the subscribers' and parliamentary deeds, previously to the passing of the act sold his scrip certificates; and having been, subsequently to the act passing, required to pay calls on his shares, filed a bill, praying that the purchaser might be declared to have taken an equitable assignment of those shares, and might indemnify the plaintiff from all past and future liabilities from the time of the sale.

Held, that the defendant, the purchaser, not having signed the subscribers' or parliamentary deeds, was in no way liable to the Company. That there being no special contract between the parties, binding the purchaser to accept a legal transfer of the shares, or to indemnify the plaintiff from his liabilities to the Company, a court of equity would not raise an implied contract for those purposes, and that the bill must be dismissed with costs.

Quære.—Whether a special contract for the above purpose could have been enforced, or whether the same is not illegal and void? (*Josephs* v. *Pebrer*, 3 B. & C. 639). *Jackson* v. *Cocker*, 368

2. The plaintiff, the rector of Stoke-upon-Trent, was empowered by an act of Parliament to sell the glebe lands, or to lay out the same for building purposes.

The provisional Committee of a Railway Company, who were soliciting an act of incorporation, by an agreement in writing contracted with the plaintiff to purchase a portion of the glebe which had been laid out for building, and the plaintiff, as part of the terms of the agreement, withdrew his intended opposition, and assented to the Railway Bill, which passed into an act.

At the time of entering into the agreement, all the lands, except one field which was let to a tenant, were lying waste; and after the agreement, an agent of the Company conceiving that they had purchased and paid for the land, agreed to let the unoccupied portion from week to week, and received a small sum of the tenants of that portion of the land; but discovering his mistake, on the remonstrance of the plaintiff, he put an end to the tenancy, and tendered to the plaintiff the rent received. It was not determined whether the railway would pass through the glebe land.

On a motion that the Company might be ordered to pay into Court the amount of the purchase-money for the land.

Held, that although where a purchaser has taken and continues possession, he cannot retain it without paying the purchase-money into Court; yet that in the present case the agent of the Company having entered by mistake, and having quitted possession, the rule did not apply.

Quære, whether a Court of Equity will decree the specific performance of a contract by a Railway Company to purchase land, if the Company should afterwards so exercise their powers as to disable themselves from taking the same land; and whether the vendor has any and what remedy in such a case. *Tomlinson* v. *The Manchester and Birmingham Railway Co.*, 104

VERIFICATION.

See PLEADING, 5, 13, 16.

WAIVER.

See SHARES, 2.

WASTE.

See INJUNCTION, 2.

WATERCOURSE.

See DAMAGE, 1.
INJUNCTION, 1.
MANDAMUS, 1.

WAY-LEAVE.

See DEED, 1.
INJUNCTION, 4.

WHARF.

See COMPENSATION, 3.

WITNESSES.

See EVIDENCE.

WORKS.

See BRIDGE.
DAMAGE, 2.

WRITING.

See COMPENSATION, 2.
FRAUDS.

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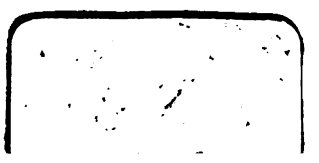
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